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AMERICA'S DEBT TO ENGLAND.

THE ANGLO-SAXON NATIONS AND THEIR CONSTITUTIONS CONSIDERED.

The unlooked-for events of the past few years have brought before us in a startling manner the impotence of international law, and the brittle foundation upon which rest the administration of justice, and the protection of life and liberty. Parts of Europe are in a condition of chaos, and all of it in poverty and unrest and misery of greater or less intensity. Forms of government and constitutional safeguards are being tested as never before.

Happily situated as we are in Canada, we can contemplate with some degree of equanimity the upheavals in other parts of the world and compare conditions existing elsewhere with our own. Naturally we turn first to the two great Anglo-Saxon nations, the far-flung British Empire, whose possessions are washed by every ocean, and the United States of America, which but recently forsook its selfish isolation and entered the arena of the world's activities.

We have to recognize, much as we may perceive the danger connected with it, that the slogan of the day is the word "Democracy," that which Abraham Lincoln spoke of, in his immortal speech at Gettysburg, when he said, "We here highly resolve that these dead shall not have died in vain, that this nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth."

The country that he gave his life to revive claims to be the great exponent of democracy; but, when we compare its form of government and its constitutional safeguards with those of England, there can be no doubt that the will of the people is more

quickly put in force and with less friction in Great Britain than in the United States. In the latter the President can, if he wants to, and sometimes does, block the national will and successfully oppose changes which in the Mother Country would be made almost automatically. The President has really greater power than the King. The former can, and often does of his own will, exercise arbitrary powers while the King is more or less a figure-head. This is not true democracy.

We are led to these reflections by the perusal of an interesting and instructive article received from Mr. Lucius B. Swift, counsellor-at-law, Indianapolis, Ind., in which he expresses himself as follows:—

"It would be impossible to estimate the percentage of citizens of the United States who were in heart and word on the side of the Allies from the day when the great war began in August, 1914. The two years and eight months which went by before the United States entered were passed by many of those citizens in rebellion, frequently concealed but more often open, against the President's express warning that we must be neutral, not only legally, but in our thoughts. Day by day we asked the question why we had so many people who took shelter under the President's warning and by varied outcries shewed their failure to comprehend that the struggle was shaking liberty throughout the world. There was Mr. Bryan, our painful Secretary of State, with a following of men and women who sang "I didn't raise my boy to be a soldier" and who fought hard to make us, by staying at home ourselves and by keeping our ships of commerce at home, submit to the domination of the Kaiser at once, without striking a blow, or even waiting for his final victory. Our socialists, with a few notable exceptions, preached that there was no such thing as patriotism, and there were frequent declarations of intended refusal to serve in any war. A large bulk of farmers and commercial men wanted to be kept out of the war, and labour seemed to think that the demands of labour were first in importance. Americans of German birth or descent, even to the fourth generation, seemed to rise as one man to back the Kaiser up. Greater than all the rest was the lack of English-speaking-race patriotism,

and with it an indifference as to what might happen to Great Britain in this war. As to liberty, they said, we won that by the Revolution!

Of course all this was changed. The time came when the cry that liberty was in a fight for life was in every mouth, and then the country went solid for the Allies with tremendous financial and martial strength. It put itself under autocratic power. It went into the struggle body and soul. The voice of the pacifist and the traitor was stifled. To the remotest hamlet it was work and save and give to win. And when the Americans appeared on the battle line it was with an efficiency so high and a bravery so exalted that words fail us to express our thankfulness. They equalled the Canadians, and we could not ask more. Nevertheless, may a kind providence keep us becomingly modest when we compare what we did with what Britain and her Allies have done.

But why was threatened liberty so long in finding this unanimous voice in the United States? The above declaration that we won our liberty by the Revolution answers the question. To the average American the history of the principle embodied in the words of the slogan of the Revolution, "No taxation without representation," begins with that event. Its centuries-old history back of that is unknown to him—and so with all the rest. The entire structure of Anglo-Saxon liberty has never in any school been pointed out to him as his own shelter worthy of his reverence and pride and laying upon him a duty to maintain it which binds him to the English-speaking race, which built that structure and to-day maintains it. We have never even named the foundations of their liberty to American youth. Much less have we told them the story of the storms which for centuries raged around the building of those foundations, nor of the blood and sacrifice and suffering which went into the construction; and we have never mentioned the subject to immigrant citizens. Autocratic governments impress upon their subjects the virtues of emperors and kings and princes, to cement allegiance. We do not even take the trouble to bring to American citizens the knowledge of the history of the rights which make them free. If we did it would become a religion arousing all Americans at any sign of danger.

If you ask the inhabitants of America what are the foundations of the liberty they enjoy, a great majority will name the American Revolution only. For this situation I blame the schools, and particularly the grades below the high schools, because more than three-fourths of American youth never reach the high school. For more than a century we have brought up American children to hate England, and this has led us to slur over the history of those foundations of our liberty which rest upon English soil.

We send the children out to form public opinion founded upon ignorance and prejudice, and this in a crisis is an opinion dangerous to the welfare of the country. For more than a century we have in effect taught each generation of children that Lexington, Concord and Bunker Hill were the beginning of all liberty; and, after hearing us talk, our immigrant citizens have come to the same conclusion.

Let me say at once that, whatever we have taught, the importance of the Revolution itself will never diminish. Our fathers fought for the rights of Englishmen and won. They not only secured to us imperishable blessings but they freed every English colony from a selfish colonial policy; and their action inspired the people of the civilized world to examine into their own rights. This examination caused a realization of wrongs which set the world ablaze, first in the French Revolution, and again in the continental uprisings in 1848—the one leading by painful steps to the self-governed France of to-day, the others done to death by the bayonets of autocracy.

Our Revolution and our abolition of slavery were indeed major foundations of American liberty, and they are America's noble contribution to the list. But other battles had been fought and won, in the centuries past, which educated and inspired our fathers and made them master builders to build these two American foundations. The results of those other victories lie in the midst of us and yet unseen; generations come and go in happiness because of

Ancient right unnoticed as the breath we draw.

Let me refer briefly to some of those ancient rights, and how they were won and how they have been forgotten and why.

Americans are as familiar with elections as with the alphabet. They see the representatives of the people, chosen in various ways, go to their duties in every direction, from township officers to the President and Congress; from the justice of the peace to the Supreme Court of the United States. We do not stop to consider that this representative government is vital to American liberty and that, without it, we should pass under the yoke of arbitrary rule. Knowledge of its origin and history can alone make us comprehend our debt. No youth should leave school without knowing that our Anglo-Saxon forefathers carried representative government from the forests of Germany into England; how it flourished in the hundred-moot, the shire-moot and the folk-moot; how all government was laid prostrate for the moment by William the Conqueror; how, starting again the Great Council of the Norman Kings, the people of England slowly, against their kings, built up a more and more representative government, which developed into the English Parliament and the American Congress of to-day; how the people of England drove to the block and to exile their kings who would rule in defiance of their laws and without the representatives of the people in parliament assembled; and finally how our English fathers came and planted representative government upon the shores of America; how, ever since, those who had known only the hand of a ruler have come here and have been permitted to enjoy the ancient Anglo-Saxon right of joining in the choice of representatives of the people, and so have become rulers themselves.

We settle our disputes by Courts. These were not invented by Washington and Hamilton and Jefferson. I would have children taught that they are not new; that they were not granted by any king; that they were present in the elements which produced the Anglo-Saxon race. The village-moot, the hundred-moot and the folk-moot were all Courts. In all of those Courts disputes were settled according to the customs as stated by the elder-men. This was the making of the common law. After six hundred years William the Conqueror and his successors built upon this Anglo-Saxon foundation the Courts which have developed into the English and American courts of to-day. The recorded decisions of those

courts, century after century, gave shape to the magnificent structure of the common law, the customs of the people, which had been growing from the earliest ages at a pace equal to the task of protecting the lives, the liberty, and the property of the people. When the Cavaliers and the Puritans came, they did not have to invent a system of Courts or enact a body of law; they brought both with them from England and they are here to-day. To teach this history to American boys and girls is simply to prepare them to be ordinarily intelligent citizens.

In every county seat in the country is the court-house. American youth are familiar with the twelve seats for the jurymen, but beyond that they know little. No one teaches them the venerable origin of those twelve seats; that the germ of the jury appeared in France; that the Normans found it there and carried it into England 850 years ago; that it died out on the continent, to to be revived in later centuries, but that England seized upon and developed it until, in the fourteenth century, it came to its full growth when "twelve good men and true" were put into the jury seats and sworn to "a true verdict give." This was a new way to enforce an old right. Already, for many centuries, the Anglo-Saxon, in the hundred-moot, the folk-moot and the shire-moot, had had the right of trial by his equals, and Magna Charta had already registered that right in the declaration that no freeman should be proceeded against except by the "legal judgment of his peers."

No one has seen the jurymen rise from their seats, at the end of the evidence in a murder trial, and slowly file out to decide in privacy the question of life or death, without a feeling of awe; but when we add to this the fact that for six hundred years these twelve men have been a shield of justice protecting the weakest of the community, then what was commonplace becomes glorified. Which is better, to have no impression whatever of trial by jury, except that we have it, or to make the heart swell with pride by the knowledge that, for 1,500 years, every Anglo-Saxon has had the right of trial by his equals, and that all who come from all parts of the world enter here into the enjoyment of this ancient right as a free gift?

Americans have no vivid picture of the mighty drama of Magna Charta; of the English people demanding that a written record be made of their centuries-old rights. And when it was written and presented to John Lackland, he answered, "I will never grant such liberties as will make me a slave." And England rose in arms and confronted John, and then he signed. And the next day he was in arms against what he had signed, and brought over foreign troops. And the history of England for the next eighty years is the history of the struggle for the enforcement of the charter. At last, Edward I., before all the people in Westminster Hall, burst into tears and admitted that he was wrong; and while later kings evaded the charter, not one denied that it was the law. When this picture is unfolded before American youth, and when they read the words written seven hundred years ago: "We will not go against any man nor send against him save by the legal judgment of his peers or by the law of the land," then they will realize that their right to live in full enjoyment of the liberty guaranteed by those words was established by an immortal struggle; and that when our fathers came to America, no matter from what country, they stepped at once into full enjoyment of that right. We cannot afford not to have that fact and the picture of that struggle indelibly written upon the mind of every boy and girl in America.

Some months ago a man was locked up in Indianapolis upon the charge of loitering. He had not loitered, but the police, suspecting him to be a criminal, made this charge to keep him in jail while they looked up his record. By command of the Judge the sheriff brought the man into our Circuit Court in order that the lawfulness of his detention might be determined. The Court found the detention unlawful and the prisoner was set free. This is the process of *habeas corpus*, and it is so familiar and so matter-of-fact that we have forgotten that we owe anybody anything for it.

Americans never stop to think that from the earliest records of the English law, running back centuries, no freeman could be rightfully detained in prison except by the legal judgment of his peers; and when Magna Charta so declared, it only declared what

had always been the law. Nevertheless in the face of Magna Charta the King claimed the right to put a man in prison and keep him there and give no reason; and the claim was sustained by a cringing Court. Then began a new struggle, lasting 464 years, through the Plantagenet, the Tudor, and into the Stuart line, from Magna Charta to 1679. During all those centuries, the King laid his hand upon men and cast them into prison. Three hundred years after the Charter eleven Judges filed a protest against imprisonment by order of noblemen; but they admitted that Elizabeth might send men to prison at her own will. The fight went on and a later Court held that the order of Charles I. was enough to deprive a man of his liberty; and men like John Hampden looked out from behind prison bars. Still the fight went on until in the second parliament after the Restoration, in 1679, the English people, again in possession of their government, "declared that not even the King's order could stand against the writ of *habeas corpus*. When the writ of *habeas corpus* was mentioned in our constitution in 1789, it was not defined; it needed no definition. The makers of the constitution knew what this bulwark of their liberty had cost; but we do not teach it to American youth.

Americans do know that we fought the American Revolution with "no taxation without representation" as our leading war-cry, but they never think of the struggle of the English people through many centuries to settle it that they should not be taxed except by law which they had a hand in making. Yet without the example of that fight before them our Revolutionary fathers would never have thought of raising objection to the Stamp Act and the Tea Tax. Americans do not realize that when, five hundred years after the Conqueror, Henry VIII., in 1525, without law, levied a tax of one-tenth of every man's substance, and when the people rich and poor cursed the King's Minister, Cardinal Wolsey, as "the subverter of their laws and liberties" and rose in insurrection, and when Henry, bull-dog though he was, had to back down and pay back, the English people were in the midst of a battle which never ended until Cornwallis surrendered at Yorktown.

Here we find the man not afraid to stand alone—to make the one-man fight. Twenty years later Henry called for voluntary

contributions but fixed the amount each man had to pay. Alderman Reed refused and was put into the army as a soldier on the Scotch border at his own charge, with orders to be put to the hardest and most perilous duty; he was captured by the Scots and had to pay more for his ransom than the gift to the King amounted to; but he made his fight, and here is his name on the roll of those who have advanced the cause of self-government. Charles I., in 1627, called upon each man to make him a loan. Two hundred country gentlemen were clapped into irons for refusing and were shifted from prison to prison to break their spirit. Dr. Mainwaring preached before Charles that the King needed no parliamentary warrant for taxation, and that to resist his will was to incur eternal damnation. John Hampden, one of the richest commoners in England, answered that he could lend the money but he feared the curse named in Magna Charta for its violation; and he was sent back into close confinement.

Again, the Petition of Right said that no man should be taxed except by law of parliament, and Charles agreed to it. Then he levied tonnage and poundage. Parliament denounced it and was adjourned by the King. Merchants refused to pay, but the Courts decided against them. Parliament came back furious and Charles dissolved it. Richard Chambers refused to pay. Summoned before the King in Council, he told them in their teeth that not even in Turkey were merchants so wrung as in England. The Star Chamber fined him two thousand pounds and ordered him to make humble submission. He was a Puritan. He refused and was sent to prison; and for three hundred years his name has been on the roll of patriots.

In 1636 Charles ordered ship-money collected, and the highest Court decided that no statute prohibiting arbitrary taxation could be pleaded against the King's will. But notwithstanding Courts and Kings we always find the English people facing the King with the declaration that they cannot be legally taxed without their own consent, and long before the American Revolution they had won the victory.

George III. and his packed and corrupted parliament, which did not represent the people, proposed to tax America. Our

fathers, mindful of the centuries-old struggle which the English people had won, answered the proposal to tax them with a demand for the rights which Englishmen enjoyed in England; and for those rights they fought. And from whatever country our fathers came that was the fight. Lafayette, Muhlenberg, Herkimer, Steuben, Kalb, Pulaski and Kosciusko did not fight for the rights of the French in France nor of the Germans in Germany, nor of the Poles in Poland, but they fought for the rights which Englishmen had won for themselves in England, and which as part of the British Empire were our heritage, along with the common law, trial by jury and *habeas corpus*. And this was Washington's opinion. "American freedom," he said, "is at stake; it seems highly necessary that something should be done to avert the stroke and maintain the liberty which we have derived from our ancestors".

In the New York farm house in which I was born, great beams hewn from forest trees outlined the foundations; these were the sills. Other hewn timbers extended across from side to side, a few inches apart; those were the sleepers. This massive foundation, which a hundred years have not shaken, is all unseen, unless you go into the cellar. American children have never been taken into the cellar of their political history where they might see the sills and the sleepers which are the foundations of the marvellous and well-ordered liberty which they enjoy to-day. If they had been, the first gun of this war would have warned a united people of the danger of democracy. It is time to begin; and when the children ask who build these foundations of free speech, free press, right of petition, trial by jury and all the rest, with the two American exceptions, there can be only one answer—England. And when they ask, what of England to-day, they will have to be told that when George III. was trying to conquer us, the English people, led by Chatham and Burke and Fox, were struggling for the same ideals we were fighting for; and that what we won by the sword they won against the same enemy by years of political struggle until England stands to-day the government most responsive to the will of the people. And when they ask what race has preserved these foundations and spread civil liberty over the world, the answer will have to be—the English-speaking race.

In teaching history it is essential to be truthful for truth's sake; but it is equally essential that all immigrant citizens as well as native born Americans realize the struggle and the sacrifices of the hundreds of years consumed in building up the Anglo-Saxon foundations of liberty upon which the government of civilized democracy rests to-day. Knowing its history they will recognize the vast heritage of civil liberty which they here enjoy; and that that heritage was not built up by America alone, but is the common work of the English-speaking race. They will feel in their inmost souls that civilized democratic government is a pearl without price, and will view with the deepest anxiety, and place before everything else, the danger of its being shaken or checked in the world, and with their backs to the wall will resist very kind of encroachment upon it.

DAMAGES AGAINST JOINT TORT FEASORS.

On the appeal from the judgment at the trial in the action of *Basil* v. *Spratt*, 15 O.W.N. 174, the learned Chief Justice of Ontario in delivering the judgment of the majority of the Court is said to have dissented from the dictum of Lord Atkinson in *London Association for Protection of Trade* v. *Greenlands* (1916) 2 A.C. 15. In so doing his Lordship virtually dissented, not only from the particular dictum referred to, but from the unanimous opinion expressed by all of their Lordships in the House of Lords who heard that case. All were unanimous that the damages against joint tort feasors cannot be separately assessed against the individuals.. That was an action for libel against an unincorporated association, its secretary, and its local agent. Judgment was given on the verdict of the jury for £1,000 against the association and its secretary and for £750 against the local agent. The association and its secretary appealed from an order directing a new trial. The local agent did not appeal. All of their Lordships agreed that the judgment against the appellants could not be set aside unless the judgment against the local agent was also set aside and he was accordingly notified of the appeal in order that

he might say whether or not he objected to the judgment against him being also set aside

In the result it was held that the association was not suable, and that its secretary was not liable on the ground of privilege; consequently the judgment against the two defendants was set aside, and the judgment against the local agent remained.

As to this Lord Buckmaster, L.C., said as the judgments against the other defendants could not stand "the reason for setting aside the judgment against Wilmshurst (*the local agent*), is removed and that judgment may remain." Lord Loreburn also said: "As to the defendant Wilmshurst, *it would be necessary* to discharge the judgment against him, if judgment against Hadwen (*his codefendant*), were to be entered, for they were sued as joint tort feasors," thus plainly indicating that in the opinion of these two learned lords there could properly be but one judgment in the action for the like damages against all the defendants liable. Lord Atkinson states in the dictum referred to the same principle more explicitly, and in greater detail, but Lord Parker also says: "Nothing can be clearer than that in an action for a joint tort each of the joint tort feasors is liable for the whole damage, and that there is no contribution between them. Further, a judgment against one precludes subsequent proceedings against the other or others."

Thus, it will be seen, there was an absolute consensus of opinion that in an action against joint tort feasors there can be but one judgment and for the like amount against all who are found liable. In the circumstances of the case before their Lordships it was not necessary to judicially decide the point and their opinions may therefore be deemed to be merely dicta; at the same time these dicta, should the occasion ever arise, may be found to be a true enunciation of the law notwithstanding the adverse opinion of the majority of the learned Judges of the Appellate Division.

THE ADMINISTRATION OF JUSTICE IN JEOPARDY.

(COMMUNICATED.)

The due administration of justice is the very life blood of every civilized community; without it, ordered civilization becomes chaos. The administration of justice means the enforcement of the law of the land by courts and magistrates appointed by the Government of the country for that purpose. This enforcement should be certain, without fear or favour, impartial, prompt, and effective. Rigid attention to these principles has been characteristic of England's rule, at home and abroad, and largely the secret of her pre-eminence among the nations. When she fails to observe them, or any of them, her declension will have begun. Recent events in this country show that there is danger ahead in this regard.

In saying this we make no reflection on the magistracy, for our courts and magistrates are doing their duty in this respect in a most effective manner, with due regard to the complete and thorough administration of justice. But there is a weakness on the part of the advisers of the Executive in not resisting the influences, political and otherwise, brought to bear for the purpose of obtaining pardon or remission of sentences imposed by those appointed by the Crown and responsible to the public in criminal cases. This occasional, and too frequent, interference with the course of justice and necessary punishment of crime engenders a contempt for the administration of the law, which must produce disastrous results; for this practice leads to the very anarchy now shewing itself, and which the Government desires to repress.

Extreme laxity in the enforcement of criminal law in the United States made lynch law for a time almost a necessity. It will not be necessary for us to adopt some similar means of self preservation. The remedy, on the one hand, is the education of the people in the principles of true democracy—not democracy run mad—and as to the perils and fallacies underlying socialism. On the other hand, there must be prompt and stern dealing with those who transgress the law.

A member of the Chicago Bar recently wrote a book containing an indictment of those concerned in the administration of justice in the United States, the title being "Toward the Danger Mark." Many years ago a political writer startled people in this country by an article entitled "Whither Are We Drifting?" These two titles, putting them in reverse order, are worthy of thought at the present time.

To the legal profession, judges and lawyers, courts and officers, has been assigned the duty of interpreting the law as applicable to each particular case, and then enforcing the decree of the court or the magistrate. Our profession is therefore largely interested in the discussion of all matters which appertain to the administration of justice. They are also intelligent and influential in seeing that it is properly done.

Three sinister events or episodes are at this time much in the mind of thoughtful men, viz.: (1) The conviction, imprisonment and subsequent release of Arthur Skidmore, at Stratford; (2) The strike of the police force in the city of Toronto; and (3) The utterances of certain daily newspapers. Let us for a moment refer to these, and see what they mean and their logical sequence.

If this evil tendency is allowed to grow, increase, widen out, and bear fruit, the sequence must be anarchy, and the newspapers tell us day by day what anarchy means. We may well believe in this connection there will be no drifting toward the "danger mark," beyond which lay the ghastly scenes of the French Revolution and which now, on the continent of Europe, bears fruit in brutal barbarism, and the bloody butchery of Bolshevism. But we have recently heard of the distribution of poisonous propaganda in the city of Toronto by some unknown persons desiring the destruction of the present safeguards of law and order. We see therefore that the hydra-headed monster, lawlessness, is already beginning to shew itself.

This revolutionary pamphlet or "manifesto" of the "Provincial Council of Soldiers and Workers Deputies of Canada" declares that "the time is ripe for revolution and you must rise." One of these startling pronouncements says: "The only solution is that the workers take over all the factories, mines, and mills in the name of the working class and use them for themselves and sup-

press all those who try to prevent this. This is revolution, and this course is the only one which will aid the workers."

Now as to the Skidmore case. The facts are very simple.

The accused was charged with having in his possession objectionable literature within the meaning of the consolidated Orders-in-Council respecting Censorship, promulgated with the authority of, and pursuant to, sec. 6 of the War Measures Act of 1914. He was found guilty, and on December 19th was sentenced to thirty days in jail, and a fine of $500. There was no question as to jurisdiction.

The evidence for the Crown was clear and conclusive. On December 31st he was released from jail by orders from Ottawa, on the application of the Trades and Labour Council of which Skidmore was the local financial secretary. The president of the council met him at the door of the jail and congratulated him upon his release. The reasons for this act of clemency have not been disclosed, but it may not be far to seek when all the circumstances of the case are taken into consideration.

Skidmore was prominent in the socialist element in his neighbourhood. He and others had been seen to leave meetings when the audience rose to sing "God Save the King." He, with others, had made several excursions into the country around Stratford, for the purpose of forming branches of the Social Democratic Party amongst men of German origin, who, to say the least, were not of British sentiment!

It is noteworthy that the prisoner did not appeal from the sentence and did not apply for bail; if he had given notice of appeal bail would have been granted as a matter of course; thus giving colour to the statement, made at the time, that he desired to play the role of a martyr, true to his seditious and revolutionary proclivities.

More recently one Charles Watson, an ex-policeman, was found guilty by the Police Magistrate of the City of Toronto of having in his possession numerous copies of various objectionable and seditious pamphlets. He was sentenced to the penitentiary for three years, and to the payment of a fine of $500. The public will watch with curiosity and interest the result of a probable application by someone for the release of this culprit.

It is unnecessary to discuss in detail the recent police strike in the city of Toronto. The very fact that, for several days, they refused to act as police officers is, without more, sufficient to indicate the spirit of anarchy to which we now desire to draw attention. The police force is, within its local jurisdiction, in the same category as the army is in relation to the Empire. Can we imagine a body of British soldiers striking to do less work, or for larger pay. The army and the police should be treated most generously, and be well paid—no one would grudge this; but they must of necessity be outside the influence and control of labour unions, and be absolutely loyal to the governing body to which they owe allegiance.

As to our third point, it is not altogether surprising that disloyal men should disobey laws intended to protect the public against evils resulting from the promulgation of seditious literature, when some of our leading daily journals seek by unworthy sophistry to find excuses for those who openly defy the plain letter and spirit of the law. Our readers know as much about this as we do; we will therefore only give one illustration. A certain daily newspaper in the city of Toronto, of wide circulation, takes the ground that an offence created by Order-in-Council is so different from one created by an Act of Parliament that it may be treated with a measure of indifference. The writer of such rubbish must know that it is not a question as to the origin of the law, but whether in fact it is a law. If there is a law, that law must be obeyed or the offender punished. And anyone inciting others to transgress such law is himself committing a crime. The writer mentioned must know, or should have known, that the Order-in-Council in question is given authority by statute duly passed with all attendant forms and ceremonies, and has the same force as a statutory enactment to the like effect.

Since the above was written, an Order-in-Council has been passed as follows: "No conviction for any offence against the aforesaid regulations (as to objectionable publications, etc.) shall be had unless the prosecution has been assented to or approved by the Attorney-General of the Province in which the offence is alleged to have been committed.

FEES IN CRIMINAL CASES.

A very unseemly occurrence, referred to in the public papers, in connection with the Police Court business of a large city in Ontario, shews the necessity of having a tariff of fees in criminal cases for the guidance of practitioners, and the protection of the public.

It would appear that an exorbitant counsel fee was demanded and paid by a poor woman, terror-stricken by her son being brought before a Police Magistrate, charged with a petty theft. Legal services, which would have been well paid for by a fee of ten to twenty dollars, cost the unfortunate woman one hundred and fifty dollars, which she had to pay promptly. The fact that the practitioner subsequently returned the woman $125, when remonstrated with, only shews that he recognized his misconduct, but did not remove the smirch cast upon his class in the eyes of the public. It only gave rise to the suspicion that his charge was gauged, not by the value of his services, but by the mother's state of mind, and the amount of her savings.

If a tariff of fees is desirable and necessary in civil cases, it is very much more so in criminal cases. It is unfortunate that there are those in the profession who need to be watched and guarded against, but so it would appear to be, if the report in the newspapers is correct. An appropriate tariff should be prepared at once for many reasons and it is for the Law Society to take action to this end.

THE RIGHT TO TRIAL BY JURY.

The right of trial by jury is part of the British Constitution, and should not lightly be taken away. Taking advantage of the rules of court in that behalf, and possibly straining them, certain Judges (speaking now of Ontario), are much given to doing away with juries in cases coming before them. It is true, that there are many cases where the facts had better be found by a Judge than by a jury; and in certain cases, where popular prejudice might interfere with justice, juries are abolished. But to say that

one man (even though a Judge) can as a rule form a better opinion as to facts than twelve men is doubtful. A Judge is "a man of like passions" with a juryman, having the prejudices and whims belonging to his personality. The prejudice or whim of one juryman however will not sway the rest, and so there is a certain safety in numbers, although the number twelve may be larger than necessary in this respect.

The importance of a correct finding as to facts is the foundation of a just judgment. The law depends on the facts. Again, it is an almost universal rule that an appellate Court takes the facts as found by the trial Judge. This is not always safe, for the trial Judge may have some unconscious prejudice or predeliction which may affect his mind as to the facts, and he has no one beside him to criticize his conclusions. If there were two or more Judges to find the facts, greater accuracy might be expected, and the law would be laid down as applicable to this correct state of facts, and not as applicable to the supposed facts. Many of our readers, we are sure, could call to mind cases where injustice had been done by reason of an appellate Court declining to pass judgment upon the correctness of the facts as found by the trial Judge, and so giving an unjust judgment.

The subject is a large one, and worthy of full consideration; and possibly the rules above referred to might, with advantage, be amended.

SOLICITOR ACTING AS TRUSTEE.

Sometimes a testator specially desires that his legal adviser should not only act as the solicitor under his will, but also as one of his trustees; and again it is frequently to a solicitor's own professional interest to be a trustee, as he thereby usually obtains a determining voice in the solicitorship of the trust. In either case a solicitor acting as a trustee and also being paid for professional services to the trust comes into conflict with the principle that a person in a position of trust cannot be *auctor in rem suam.*

Not to cite any further authority this principle will be found enforced and explained by Lord Chancellor Cranworth in the

English case of Broughton v. Broughton, 1855, 5 De. Gex M. & G. 160, and his statement of it has ever since been accepted as practically the last word on the matter: "The rule applicable to the subject has been treated at the bar as if it were sufficiently enunciated by saying, that a trustee shall not be able to make a profit of his trust; but that is not stating it so widely as it ought to be stated. The rule really is, that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty; and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them. As the trustee might make the payment to others, this Court says he shall not make it to himself; and it says the same in the case of agents, where they may employ others under them. The good sense of the rule is obvious, because it is one of the duties of a trustee to take care that no improper charges are made by persons employed for the estate. It has been often argued that a sufficient check is afforded by the power of taxing the charges, but the answer is this, that that check is not enough, and the creator of the trust has a right to have that, and also the check of the trustee."

In consequence, in order to permit of a testator's law adviser acting as his trustee and for other motives, clauses expressly permitting him to receive the usual remuneration came to be almost invariably inserted. These clauses have, however, been adversely commented on twice by Mr. Justice Kay, *Re Chappel*, 27 Ch. Div. 584; and in *Re Fish*, 1893, 2 Ch. 413, his latest dictum being: "I wish to say on my own behalf that when a solicitor trustee himself prepares a document containing a clause of that kind in his own favour, he must not be surprised; if, when the matter comes before the Court, the Court is inclined to watch very jealously indeed his conduct as solicitor and trustee under the clause."

Notwithstanding the obvious intention of these clauses, which is to place the trustee agent in the same position as if he were not a trustee, yet in England, they have come to be regarded as conferring a benefit; in other words, as being of the nature of a legacy. Certain consequences which are not beneficial to the solicitor

trustee follow from this. If the estate is insufficient for payment of the pecuniary legacies in full, then, in default of any direction to the contrary, they all abate. Mr. Justice Eve has accordingly lately held, *Re Brown*, 1918, L.T.J. p. 441, that the solicitor's profit costs must abate among the other legacies. This case is very similar to that of *Re White*, 78 L.T. Rep. 770 (1898); 2 Ch. 217, where the Court of Appeal decided that, the testator's estate being insolvent, the solicitor trustee could not claim any profit costs until the creditors were satisfied, as the declaration made by the testator was bounty on his part. Another consequence is that neither the solicitor trustee nor his wife must attest the execution of the will, or the clause will be null and void under sec. 15 of the Wills Act, 1837. In *Re Pooley*, 60 L.T. Rep. 73; 40 Ch. Div. 1, the Court of Appeal so decided, Lord Justice Cotton saying: "It is urged that it is not a gift, for that he has to work for what he receives. That is true, but the clause gives him a right which he would not otherwise have to charge for the work if he does it, and that, in my opinion, is a beneficial gift within the meaning of the section."

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—*Central Law Journal.*

VALUE OF GOODWILL.

In most business transactions there arise questions as to the goodwill of the business, and it is of importance to have clear ideas as to the meaning, and consequently the value, of "goodwill." It is proposed in this article to set down shortly a few of the leading principles which apply to goodwill in considering its legal and commercial aspects.

There is, of course, no exact legal definition of goodwill. In *Trego* v. *Hunt* (73 L.T. Rep. 814; (1896) A.C. 7), a case in which the meaning of the term was discussed at length, Lord Macnaghten says: "It is the whole advantage, whatever it may be, of the reputation and connection of the firm which may have been built up by years of honest work or gained by lavish expenditure of money." If it is permissible to expand the idea which seems to the writer to underlie those words, it may be said that goodwill

has two aspects—(1) perfected organisation of the business, and (2) expectation of future profits from past connection and reputation. As to (1), the value of a "going concern" as compared with its "break up" value is largely a question of work and money which has been expended in converting the latter into the former. The lifeless concern has to be organised into a living concern; the suitability of premises has to be ascertained; convenient methods discovered; communications opened up; the right man found for the right job, and so forth. As to (2), this is a matter of notoriety and satisfaction to past customers. In any particular business the value of its goodwill may be composed of either or both of items (1) and (2). The value of a commercial business might well be composed of both items almost equally, while the value, *e.g.*, of a daily newspaper might consist almost entirely of the second item. It is thus obvious that goodwill is in many cases a genuinely very valuable asset—it may be the sap and life of a business—and may represent an asset of real capital value which has been acquired by laying out very large sums in experiments in organisation or acquiring publicity. It is quite proper, therefore, for a company to regard losses made during the first few years of its existence, while it is building up a business, as being capital expenditure made in the acquirement of goodwill. In this connection it is interesting to note that the rule of law that, although dividends must not be paid out of capital, a loss shewn in past years on revenue account need not be made good before profits earned in any subsequent year are distributed as dividend: (see *Ammonia Soda Company* v. *Chamerlain* (118 L.T. Rep. 48; (1918) 1 Ch. 266).

As regards the value of goodwill, generally speaking, there is not much more to be said. Goodwill varies with the nature and circumstances of the particular business. The cautious business man will be careful not to value goodwill too high, and past expenditure and the expectation of future profits are the guides thereto.

In dealing with the value of goodwill of a partnership rather different considerations apply, and there are rules in connection with the matter which it is well to note as they may be of value

to arbitrators and others who have to assess the value of goodwill on the dissolution of a partnership by death or otherwise.

Where the partnership is dissolved by the death of one partner, or by the expiration of the agreed time, or otherwise, the rule of law is that the partnership assets and effects, including the goodwill, must be sold and the proceeds divided according to the share of each partner therein. The general rule is, of course, often varied by special agreement in the partnership articles, which provide some special method of winding-up the partnership. In the absence of special stipulation, however, even if one partner buys the share of his deceased or former partner, the measure of the value which he ought to pay is what the deceased or former partner's share would fetch if the whole business were sold to a stranger. This will materially effect the value of goodwill, because on any sale to a stranger the goodwill would be depreciated in value owing to the fact that the former partners could (apart from special stipulation) set up immediately in competition with the purchasing stranger. Mr. Justice Romer said in *Re David and Mathews' Arbitration* (80 L.T. Rep. 75; (1899) 1 Ch., at p. 382): "I think that the goodwill ought to be valued on the footing of the consideration of what its value would have been to the partnership if there had been no contract between the partners that the surviving partner should purchase the share of the deceased partner in the partnership effects and securities, and, therefore, on the footing that, if it were sold, the surviving partner would be at liberty to carry on a rival business, but also, I think, on the footing that he could not use the firm name of the partnership firm, and would not have the right to solicit the old customers of the firm." The prohibition against soliciting old customers does not, of course, extend to the right to deal with them, nor does the prohibition against using the firm name extend to a former partner trading under his own name even if such name has formed part of the firm name. Hence it follows that where the goodwill is, as it were, personal, *i.e.*, has become attached to an active partner, although the goodwill may in itself be very valuable, it may be of little value to a "sleeping partner" or the executors of a deceased partner where the surviving partner has managed the business alone for some time. —*The Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

LANDLORD AND TENANT—INCOMPLETE AGREEMENT—TENANT LET INTO POSSESSION—LEASE SUBSEQUENTLY DRAWN UP—TERMS AGREED TO, BUT LEASE NOT SIGNED—RETENTION OF POSSESSION AFTER CONCLUDED AGREEMENT—PART PERFORMANCE—STATUTE OF FRAUDS (29 CAR. 2, c. 3) s. 4—(R.S. O., c. 102 s. 5).

Biss v. *Hygate* (1918) 2 K. B. 314. This was an action by a landlord to recover rent, in the following circumstances: The defendant had agreed to rent a nursery garden and had been, thereupon, let into possession, before the terms of the lease had been definitely settled. Subsequently a lease had been drawn up in the terms agreed to, but had not been signed by the defendant, who thereafter continued in possession for some weeks, when he decided to give up the premises. He set up the Statute of Frauds as a defence and the Judge of the County Court held it a good defence and dismissed the action: but a Divisional Court (Lawrence and Avory, JJ.) held that the defendant's continuance in possession after the terms of the lease had been agreed to was an act of performance unequivocally referable to the contract sufficient to take the case out of the statute, and judgment was consequently given in favour of the plaintiff.

SUMMARY JURISDICTION—SERVICE OF SUMMONS—"USUAL PLACE OF ABODE"—PLACE OF BUSINESS—Cr. Code, s. 789.

Rex v. *Braithwaite* (1918) 2 K.B. 319. In this case the Court of Appeal (Pickford, Warrington, and Scrutton, L.JJ.) affirmed the decision of the Divisional Court (1918) 1 K.B. 1 (noted *ante* vol, 54. p. 148), to the effect that service of a summons at a place of business was good service as being "a place of residence"—though not the place where the party summoned slept.

TRESPASS—SHEEP INFECTED WITH SCAB—LIABILITY OF DEFENDANT FOR DAMAGES—SCIENTER.

Theyer v. *Purnell* (1918) 2 K.B. 333. This was an action to recover damages occasioned by the defendants' sheep, which were infected with scab, trespassing on the plaintiff's land, whereby the plaintiff's own sheep also became infected with the disease. The defendant set up as a defence that he was ignorant that his sheep were infected with the disease. The Judge of the County

Court who tried the action, in the absence of any evidence that the defendant knew of the condition of the sheep, nonsuited the plaintiff: but a Divisional Court (Lawrence and Avory, JJ.) held that he was wrong; and that in case of trespass the question of *scienter* is immaterial, and therefore that the plaintiff was entitled to recover all damages consequent on the presence of the defendant's sheep on the plaintiff's land as well before as after they had been interned on the plaintiff's land, on the discovery of the disease, pursuant to an order made under the Diseases of Animals Act, 1894.

EMPLOYER AND EMPLOYEE—CONTRACT OF HIRING—IMPLIED CONDITION—TERMINATION OF CONTRACT—REASONABLE NOTICE.

Payzu v. *Hannaford* (1918) 2 K.B. 348. This was a case stated by a magistrate, on a complaint made by an employer that the defendant being employed in their service at a weekly wage of 35s. had left the employment without notice—in consequence of which the complainants claimed damages 35s. less 5s. 10d., one day's wages, which the defendant had actually worked. The magistrate was of opinion that it was not an implied term of the contract of service that the party desirous of terminating it should give a week's notice and he thereupon dismissed the complaint; but a Divisional Court (Darling, Lawrence, and Avory, JJ.) held that in the absence of an express agreement to the contrary, it is an implied condition of every contract of hiring that it cannot be determined by either except upon reasonable notice, and that in the case of a weekly hiring, a week's notice is a reasonable notice, and in the case of a daily hiring a day's notice is a reasonable notice; and because it was not quite clear on the facts presented to the Court whether the contract in question was a weekly, or daily hiring, the case was remitted for further investigation on that point.

LANDLORD AND TENANT—NOTICE TO QUIT—COVERING LETTER—VALIDITY OF NOTICE—UNCERTAINTY.

Norfolk v. *Child* (1918) 2 K.B. 351. The point in issue in this case was the validity of a notice to quit on October 11, 1917, accompanied by a letter from the agent of the landlord in the following terms: "I am instructed by the Small Holdings and Allotment Committee to serve upon you the enclosed notice to quit which is intended to terminate the tenancy at Michaelmas next unless they see sufficient reason in the meantime to change their opinion." It was claimed by the tenant that this rendered the notice uncertain and therefore void and the Judge of the

County Court so held; but a Divisional Court (Avory and Lawrence, JJ.) upset his decision, considering that the covering letter only gave expression to the right which a landlord has to waive a notice to quit by arrangement with his tenant.

COPYRIGHT—ASSIGNMENT OF COPYRIGHT—ASSIGNMENT OVER—ROYALTIES—LIABILITY OF SECOND ASSIGNEE—COVENANT—RUNNING WITH PERSONALTY—CHARGE—VENDORS' LIEN.

Barker v. *Stickney* (1918) 2 K.B. 356. The plaintiff in this case was the original owner of a copyright. He sold it to a company in consideration of a certain number of shares in the company and also certain royalties which the company covenanted to pay, and subject also to a condition that the company would assign only to successors in business and subject to the terms of the deed so far as applicable. The company got into difficulties and a receiver appointed by debenture holders, with the assent of the ordinary creditors of the company, sold to the defendant who was a successor in business of the company the copyright so far only as the vendors had any right to sell and subject to all equitable claims thereon. The present action was brought against this vendor for an account and payment of royalties in respect of the copyright. McCardie, J., who tried the action, held that the plaintiff was not entitled to succeed: (1) because the defendant was not under any contractual liability to pay royalties to the plaintiff; (2) because the original deed of assignment did not purport to make the royalties a charge upon the copyright; (3) because the deed constituted the company sole owners of the copyright and did not express that the royalties were to be paid as part of the purchase money, therefore it did not reserve a vendor's lien on the copyright for the royalties; (4) and because a mere reservation of royalties does not amount to a reservation of any lien therefor. The plaintiff's action therefore failed.

PRACTICE—PARTIES—ADDING A PARTY DEFENDANT ON A DEFENDANT'S APPLICATION—JURISDICTION—ADDITION OF ALLEGED JOINT CONTRACTOR AS DEFENDANT.

Norbury v. *Griffiths* (1918) 2 K.B. 369. This was an action on a contract and the defendant alleged that the contract was made jointly with another person whom he applied to add as a co-defendant. Bray, J., refused the application, but the Court of Appeal (Pickford, Warrington, and Scrutton, L.JJ.) made the following order which as it is peculiar we give in full: "That S. A. Vasey be joined as a co-defendant in this action, and that the defendants be then at liberty to bring a counterclaim jointly

against the plaintiffs, and that the plaintiffs are not to be prejudiced by such joinder if it should be held that the contract sued upon was not a joint contract and that the said S. A. Vasey is not liable thereon, and in that case the defendant F. Griffiths is to pay his co-defendant, S. A. Vasey, his costs subject to any right of contribution one may have against the other," and the plaintiff was ordered to pay Griffiths the costs of the appeal in any event. This seems an anomalous proceeding and we have referred to it more at length on another page.

NUISANCE—CHILDREN'S HOSPITAL FOR SURGICAL TREATMENT OF TUBERCULOSIS—RISK OF INFECTION—LEASE—RESTRICTIVE COVENANTS—BUILDING SCHEME—CONVEYANCE OF REVERSION—HOUSE NOT TO BE USED OTHERWISE THAN AS PRIVATE DWELLING—INJUNCTION.

Frost v. *The King Edward VII. Welsh National Association* (1918) 2 Ch. 180. This was an action to restrain the defendants from carrying on a children's hospital for the surgical treatment of tuberculosis, on two grounds, (1) that the hospital was a nuisance; (2) that the defendants were bound by a restrictive covenant not to use the premises in question otherwise than for a private residence. Eve, J., who tried the action, held that no case of nuisance had been made out; but, on the second ground, he granted an injunction suspending its operation for six months. The facts relating to the restrictive covenant in respect of which the injunction was granted were somewhat complicated. The premises in question were originally demised in 1887 for a term of 99 years subject to a covenant by the lessee not to carry on any offensive business. The reversion was afterwards in 1889 conveyed to a Mrs. Wilson, who covenanted with the grantors for the benefit of themselves and those claiming under them not to use the premises otherwise than for a dwelling; she then in 1893 conveyed the reversion to the lessee who covenanted to indemnify her against her covenant. The lessee being then owner of the fee conveyed to the defendants, and it was held that they were bound by the covenant in the lease of 1839, the premises in question being the subject of a building scheme of which the plaintiff's property was part.

WILL—CONSTRUCTION—"ISSUE"—CONTEXT.

In re Burnham, Carrick v. *Carrick* (1918) 2 Ch. 196. In this case Sargant, J., in considering a will, holds that for the purpose of determining the meaning of the word "issue" in a will the context may be looked at, and where it is apparent from other

parts of the will that the testator has drawn a distinction between "issue" and "children," the word "issue" may have a wider meaning than "children" and include grandchildren and other similar issue, and he so construed the word "issue" in the will under consideration.

LANDLORD AND TENANT—PAYMENT OF RENT—DEDUCTION BY TENANT OF PROPERTY TAX PAID BY HIM—PROOF OF PAYMENT BY TENANT.

North London and General Property Co. v. *Moy* (1918) 2 K.B. 439. In this case the Court of Appeal (Pickford, Warrington, and Scrutton, L.JJ.) have reversed the judgment of Low, J. (1917) 2 K.B. 617 (noted *ante* vol 54, p. 62). The question was whether a tenant who claimed to have paid the property tax was bound to produce proof of payment to his landlord. Low, J., thought that he was, but the Court of Appeal came to the conclusion that the Act authorizing the tenant to pay the tax and deduct it from his rent did not impose on him liability to produce evidence of the payment to his landlord. Their Lordships thought that the defendant had acted very unreasonably, and though they dismissed the action, did so without costs, but allowed the defendant the costs of the appeal.

SHIP REQUISITIONED BY ADMIRALTY—SALVAGE SERVICES PERFORMED BY VESSEL REQUISITIONED—RIGHT TO SALVAGE—"SHIP BELONGING TO HIS MAJESTY"—MERCHANT SHIPPING ACT, 1894 (57-58 VICT. C. 60) S. 557—MERCHANT SHIPPING (SALVAGE) ACT, 1916 (6-7 GEO. V. C. 41) S. 1.

Admiralty Commissioners v. *Page* (1918) 2 K.B. 447. By the Merchant Shipping Act, 1894, s. 557 it is provided that when salvage services are rendered by a ship belonging to His Majesty no charge is to be made therefor, but by the Merchant Shipping (Salvage) Act, 1916, s. 1., it is provided that if salvage services are rendered by any ship belonging to His Majesty specially equipped with salvage plant then, notwithstanding s. 557 above referred to, the Admiralty shall be entitled to claim for salvage services rendered by such vessel. In the present case a tug was requisitioned by the Admiralty upon terms which amounted to a demise of the vessel and while so in the service of the Admiralty was especially equipped with salvage plant and rendered salvage services; and the question presented for Bailhache, J's, decision was whether the owners, or the Admiralty were entitled to the amount of the salvage award. This depended on whether or not the vessel was to be regarded as "belonging to His Majesty," within the

meaning of the Act of 1916, and the learned Judge held that it was, and consequently that the Admiralty were entitled.

COMPANY—ISSUE OF SHARES—BROKERAGE—COMMISSION—NON-DISCLOSURE IN PROSPECTUS OF PAYMENT OF COMMISSION—COMPANIES' ACT, 1908 (8 EDW. VII. c. 69) s. 89—(R.S.O. c. 178, s. 100).

Andreae v. *Zinc Mines* (1918) 2 K.B. 454. The plaintiff claimed to recover from the defendant company a balance alleged to be due under an agreement whereby the company bound itself to pay a commission of ten per cent. on all shares in the defendant company for which the plaintiff should find subscribers. This agreement was not disclosed in the prospectus. Part of the commission had been paid and the defendant company counterclaimed that the agreement was illegal and for a return of the commission actually paid. The plaintiff endeavoured to support the agreement as being one for brokerage and therefore protected by the Companies' Act, 1908, s. 89 (see R.S.O. c. 100 (3)), but Bailhache, J, held that the agreement was really an agreement to pay a commission (the plaintiff being a *feme sole* and not carrying on business as a broker or otherwise), and that the agreement was illegal because not disclosed in the prospectus of the company: but while he dismissed the action, he also refused to give the defendant company any relief on its counterclaim.

CONTRACT—SALE OF GOODS—IMPOSSIBILITY OF PERFORMANCE DUE TO OUTBREAK OF WAR.

Blackburn Bobbin Co. v. *Allen* (1918) 2 K.B. 467. This was an appeal from the decision of McCardie, J (1918) 1 K.B. 540. The contract was made in 1914 for the sale of Finnish birch timber to be delivered in England. The plaintiffs had no notice that the timber was not kept in stock by the defendants. The contract contained no war, or *force majeure*, or suspension provisions. Owing to the war the defendants were unable to procure shipment of the timber from Finland and were consequently unable to perform the contract. McCardie, J, held, that this did not relieve the defendants from liability and the Court of Appeal (Pickford, Bankes, and Warrington, L.JJ.) affirmed his decision.

CONTRACT—ILLEGALITY—ALIEN ENEMY—SUSPENSION CLAUSE—ABROGATION OF CONTRACT—PUBLIC POLICY.

Naylor v. *Krainische Co.* (1918) 2. K.B. 486. This was an appeal from the judgment of McCardie, J. (1918) 1 K.B. 331

(noted *ante*, vol. 54, p. 222). The contract in his case was made before the war for the sale of iron. After the contract had been partly performed the war commenced and the defendants thereby became alien enemies. In these circumstances McCardie, J., held that, quite apart from any special provisions as to the suspension of the contract in case of war, on the ground of public policy, the contract was dissolved, and the Court of Appeal (Pickford, Bankes, and Warrington, L.JJ.) held that after the judgment of the House of Lords in *Ertle Bieber Co* v. *Rio Tinto Co.* (1918) A.C. 260, the case was unarguable and dismissed the appeal.

SHIPOWNER—CHARTERPARTY—CONTRACT TO PAY BROKER'S COMMISSION—CUSTOM—ENFORCING CONTRACT IN FAVOUR OF THIRD PARTY.

Leopold Walford v. *Les Affreteurs Anonyme* (1918) 2 K.B. 498. This was an action to enforce a contract made in favour of a person not a party thereto, in the following circumstances: By a charterparty made by the defendants it was provided that "a commission of three per cent. on the estimated gross amount of hire is due to Leopold Walford on signing this charter (ship lost or not lost)." The action was brought by Leopold Walford but it was arranged between the parties, to avoid the necessity of amendment, that the action should be treated as if brought by the charterers as trustees for Leopold Walford; and it was held that, so brought, the action was maintainable, following *Robertson* v. *Ward* (1853) 8 Ex. 299. The defendants sought to escape liability on the ground that, by a custom, brokerage was never payable, no matter what the form of the contract, unless the hire was earned. Bailhache, J., who tried the action, held that such a custom had been proved and as no hire had been in fact earned under the charterparty, no brokerage was payable; but the Court of Appeal (Pickford, Bankes, and Scrutton, L.JJ.) held that a custom which purported to override the express terms of a written instrument was bad, and that under the terms of the contract in question the brokerage was payable though no hire was earned.

RAILWAY COMPANY—UNDERTAKING LEASED TO ANOTHER COMPANY—RENTAL—DEPRECIATION OF CAPITAL—DEBENTURE HOLDERS—PAYMENT OF DIVIDENDS OUT OF RENTAL—RESTORATION OF CAPITAL.

Lawrence v. *West Somerset Mineral Ry.* (1918), 2 Ch. 250. This was an action by a debenture holder of the defendant company to restrain payment of dividends on the ground that the capital

had depreciated and that it should be first restored. The facts of the case were that the defendants, capital consisted of £105,000, of which £30,000 had been raised on the security of debentures. The defendant company had leased its whole undertaking to another company for which it received £5,575 per annum. This sum it applied in paying the interest on the debentures and the surplus was applied in payment of dividends. The assets of the company had depreciated in value below the £105,000 and the plaintiff (whose debentures were not in arrear), claimed that the equilibrium between the assets and the capital should be first restored out of the annual rental before any part was applied to the payment of dividends. Eve, J., who tried the action, held that the plaintiff was not entitled to the relief claimed; and that the dividends, in the circumstances, could not be held to be paid out of capital.

TRADE MARK—INFRINGEMENT—RECTIFICATION OF REGISTER—SEVEN YEARS REGISTRATION OF MARK THAT SHOULD NOT HAVE BEEN REGISTERED—"REGIMENTAL" AS TRADE MARK—TRADE MARKS ACT, 1905 (5 EDW. VII. c. 15) ss. 11,35,41—(R.S.C. c. 71, s. 42).

Imperial Tobacco Co v. *Pasquali* (1918) 2 Ch. 207. This was a proceeding to remove a trade mark from the register on the ground that it should never have been registered. The trade mark in question was the word "Regimental" as applied to cigarettes. It had been registered over seven years. Astbury, J., who heard the application, ordered its removal; but the Court of Appeal (Eady, Warrington, and Duke, L.JJ.) reversed his order on the ground that a trade mark which had been registered upwards of seven years is, unless open to the objection that it is calculated to deceive, or is otherwise disentitled to the protection of the Court, or is contrary to law or morality or is scandalous, is irremovable under s. 41 of the English Trade Mark Act, 1905. Under the Canadian Trade Mark Act, (R.S.C. c. 71.) s. 42, it is possible that the opposite conclusion might be reached. The Court of Appeal held that the mere fact that the mark registered ought not to have been registered, was not alone sufficient to disentitle it to the protection of the Court.

Reports and Notes of Cases.

Dominion of Canada.

EXCHEQUER COURT.

Cassels, J.] [43 D.L.R.1.

RE LAVERS' HEELS PATENT LTD.

Patents—Old elements—Patentable combination—Elements in previous patents—Validity.

Bringing together all elements in such a way as to be useful and produce a combination which has the essentials requisite to a valid patent entitles an applicant to have patent issue, notwithstanding that each of such elements can be traced in previous patents.

Russel S. Smart, for petitioner.

ANNOTATION ON ABOVE CASE FROM 43 D.L.R.

What are termed combinations form an important class of inventions. The term "combination" has no statutory foundation. Patents are granted in Canada for any new and useful "art, machine, manufacture or composition of matter." The machine or manufacture or composition of matter may be composed of a number of elements co-operating together, and when this is so the term "combination" is often applied to it.

Frequently the word "combination" is used, especially in the specification of a patent to describe any invention made up of parts more or less complex. Technically, however, the word is used to refer to cases where there is some interaction or functional co-operation of the parts, producing a separate entity having a result and characteristics different from the sum of the individual results and characteristics of its elements. Buckley, L.J., in *British United Shoe Machinery* v. *Fussell* (1908), 25 R.P.C. 631, 657, defined a combination as meaning "a collocation of intercommunicating parts with a view to arrive at a simple result." *Proctor* v. *Bennis* (1887), 36 Ch. D. 740; *Wood* v. *Raphael* (1896), 13 R.P.C. 730; *Crane* v. *Price* (1840), 1 W.P.C. 377, 383, 409; *Murray* v. *Clayton* (1872), L.R. 7 Ch. App. 570.

Combinations when they produce a new result or a known result in a new way are considered to be patentable inventions. (*British United Shoe Machinery Co.* v. *Fussell, supra*; *Williams* v. *Nye* (1890), 7 R.P.C. 62; *Wood* v. *Raphael, supra*; *Anti-Vibration Incandescent Lighting Co.* v. *Crossley* (1905), 22 R.P.C. 441; *Goddard* v. *Lyon* (1894), 11 R.P.C. 354; *Marconi* v. *British Radio Telegraph & Telephone Co.* (1911), 28 R.P.C. 181; *British Westinghouse Electric and Mfg. Co.* v. *Braulik* (1910), 27 R.P.C. 209; *International Harvester Co. of America* v. *Peacock* (1908), 25 R.P.C. 765, 777; *Gramaphone and Typewriter Co. Ltd.* v. *Ullmann* (1906), 23 R.P.C. 752.)

All of the elements of a combination may be old, but the combination may itself constitute an invention. (*Lister* v. *Leather* (1858), 8 El. & Bl. 1004, 120 E.R. 373; *Bovill* v. *Keyworth* (1857), 7 El. & Bl. 725, 119 E.R. 1415; *Crane* v. *Price* (1842), 1 W.P.C. 383.)

The leading Canadian case of *Smith* v. *Goldie* (1882), 9 Can. S.C.R. 46, deals with this point. The headnote reads:—

"An invention consisted of the combination in a machine of three parts, or elements, A, B and C, each of which was old, and of which A had been previously combined with B in one machine, and B and C in another machine, but the united action of which, in the patented machine, produced new and useful results. *Held* (Strong, C.J., dissenting), to be a patentable invention."

In the judgment, Ritchie, J., said, p. 50:—"Where the patent is for a combination, the combination itself is the novelty and also the merit."

And Henry, J:—"The result in this case is produced by the combined and simultaneous action of the draft upwards created by the fan, and the continuous operation of the brush or brushes worked by the machinery as described in the specification. It was the simultaneous action which produced the result. . . . By the co-operation of the constituents, a new machine of a distinct character and function was formed, and a beneficial result produced by the co-operating action of the constituents, and not the mere adding together of the separate contributions."

For other Canadian authorities on combinations see *Toronto Telephone Mfg. Co.* v. *Bell Telephone Co. of Canada* (1885), 2 Can. Ex. 495; *Robert Mitchell* v. *Handcock Inspirator Co.* (1886), 2 Can. Ex. 539; *Griffin* v. *Toronto R. Co.* (1902), 7 Can. Ex. 411; *Mattice* v. *Brandon Machine Works* (1907), 17 Man. L.R. 105; *Dansereau* v. *Bellemare* (1889), 16 Can. S.C.R. 180; *Barnett McQueen* v. *Canadian Stewart* (1910), 13 Can. Ex. 186.

A new combination may be formed by the omission of an element from, or by the addition of an element to, the elements of an old combination, provided there is a new result produced by a different interaction of the elements. (*Pneumatic Tyre Co.* v. *Tubeless Tyre Co.* (1897), 15 R.P.C. 74; *Wallington* v. *Dale* (1852), 7 Exch. 888; *Russell* v. *Cowley* (1834), 1 W.P.C. 459; *Morris* v. *Bransom* (1776), 1 W.P.C. 51; *Vickers* v. *Siddell* (1890), 15 App. Cas. 496.) The substitution of a new element in an old combination, if the element substituted is not obviously and demonstrably an equivalent of the one for which it was substituted, may involve invention. (*Unwin* v. *Heath* (1855), 5 H.L. Cases, 508, 522, 1 W.P.C. 551; *Badische Anilin und Soda Fabrik* v. *Levinstein* (1885), 2 R.P.C. 73.)

For American cases on combination see *San Francisco* v. *Keating*, 68 Fed. 351, 15 C.C.A. 476; *Von Schmidt* v. *Bowers*, 80 Fed. 140, 25 C.C.A. 323; *American* v. *Helmstetter*, 142 Fed. 978, 74 C.C.A. 240; *National* v. *Aiken*, 163 Fed. 254; *Hoffman* v. *Young*, 2 Fed. 74; *National* v. *American*, 53 Fed. 369; *Green* v. *American*, 78 Fed. 119, 24 C.C.A. 41; *Gill* v. *Wells*, 89 U.S. 1; *Electric* v. *Hall*, 114 U.S. 87; *Prouty* v. *Ruggles*, (1842), 16 Pet. 336; *McCormick* v. *Talcott*, (1857), 20 How. 402; *Vance* v. *Campbell* (1861), 1 Black 427; *Dunbar* v. *Myers*, 94 U.S. 187.

It is necessary to distinguish combinations from mere aggregations. Aggregation is not invention either in processes, machines or manufactures. (*Hailes* v. *Van Wormer* (1873), 20 Wall 353.) The elements which are col-

located in an aggregation may themselves, if new, amount to separate inventions, but assembling these elements, unless there is interaction, can produce no new result, and there can, therefore, be no invention. For example, in *Reckendorfer* v. *Faber* (1875), 92 U.S. 347, a rubber eraser was placed on the end of a pencil and a patent claimed for the alleged combination. The Supreme Court of the United States held that the pencil and eraser each continued to perform its own duty and nothing else. No effect was produced; no result followed from the use of the two and consequently the union was an aggregation and not invention. (See also *Williams* v. *Nye* (1890), 7 R.P.C. 62; *Thompson* v. *James* (1863), 32 Beav. 570, 55 E.R. 224; *Rushton* v. *Crawley* (1870), L.R. 10, Eq. 522.)

The test of combination is the presence of a result different from the individual results of its elements. Buckley, L.J., in *British United Shoe Machinery* v. *Fussell* (1908), 25 R.P.C. at p. 631, thus states the rule:—

"For this purpose a combination, I think, means not every collocation of parts, but a collocation of intercommunicating parts so as to arrive at a desired result, and to this, I think, must be added that the result must be what, for the moment, I will call a simple and not a complex result. . . . It is not every combination of parts which is for this purpose a combination."

For other English authorities see *Crane* v. *Price* (1840), 1 W.P.C. 377; *Cannington* v. *Nuttall* (1871), L.R. 5 H.L. 205; *Huddart* v. *Grimshaw* (1803), 1 W.P.C. 86; *Bovill* v. *Keyworth* (1857), 7 El. & Bl. 725, 119 E.R. 1415; *Minter* v. *Wells* (1834), 1 Cr. M. & R. 505; *Anti-Vibration Incandescent Lighting Co.* v. *Crossley* (1905), 22 R.P.C. 441, 445; *British United Shoe Machinery Co. Ltd.* v. *Fussell* (1908), 25 R.P.C. 257; *Williams* v. *Nye* (1890), 7 R.P.C. 62; *Newton* v. *Grand Junction R. Co.* (1850), 5 Exch. 331, 334; *Boulton* v. *Bull* (1795), 2 H. Bl. 463; *Lister* v. *Leather* (1858), 8 El. & Bl. 1004, 120 E.R. 373; *Morton* v. *Middleton* (1863), 1 Macph. (Ct. of Sess.) 718; *Marconi* v. *British Radio Telegraph & Telephone Co.* (1911), 28 R.P.C. 181; *British Westinghouse* v. *Braulik* (1910), 27 R.P.C. 209.

The same distinction was drawn in *Hunter* v. *Carrick* (1885), 11 Can. S.C.R. 300, where it was held that a mere aggregation of parts not in themselves patentable and producing no new result due to the combination itself, was not invention, and consequently it could not form the subject of a patent.

For Canadian cases see *North* v. *Williams* (1870), 17 Gr. 179; *Walmsley* v. *Eastern Hat & Cap Mfg. Co.* (1909), 43 N.S.R. 432; *Smith* v. *Goldie* (1882), 9 Can. S.C.R. 46; *Dompierre* v. *Baril* (1889), 18 Rev. Leg. 597; *Wisner* v. *Coulthard* (1893), 22 Can. S.C.R. 178; *Copeland-Chatterson* v. *Lyman Bros.* (1907), 9 O.W.R. 908, 912; *Yates* v. *Great Western* (1877), 2 A.R. (Ont.) 226; *Woodward* v. *Oke* (1906), 17 O.W.R. 881; *Toronto Telephone Mfg. Co.* v. *Bell Telephone Co. of Canada* (1885), 2 Can. Ex. 495; *Robert Mitchell* v. *The Handcock Inspirator Co.* (1886), 2 Can. Ex. 539; *Griffin* v. *Toronto Railway* (1902), 7 Can. Ex. 411; *Mattice* v. *Brandon Machine Works Co.*, 17 Man. L.R. 105; *Emery* v. *Hodge* (1861), 11 U.C.C.P. 106; *Summers* v. *Abell* (1869), 15 Gr. 532.

For United States authorities see *Gill* v. *Wells*, 89 U.S. 1; *Electric* v. *Hall*, 114 U.S. 87; *Prouty* v. *Ruggles*, 16 Pet. 336; *McCormick* v. *Talcott*, 20 How. 402; *Vance* v. *Campbell*, 1 Black 427; *Dunbar* v. *Myers*, 94 U.S. 187; *San Francisco* v. *Keating*, 68 Fed. 351; *Hailes* v. *Van Wormer*, 20 Wall 353; *Reckendorfer* v. *Faber*, 192 U.S. 347; *American* v. *Helmstetter*, 142 Fed. 978; *National* v. *Aiken*, 163 Fed. 254.

R. S. SMART.

Province of New Brunswick.

SUPREME COURT—APPEAL DIVISION.

Hazen, C.J., White and Grimmer, JJ.] [43 D.L.R. 158.

MARITIME COAL, RAILWAY & POWER CO. v. CLARK.

1. *Sale—Acceptance of goods—No complaint as to quality—Action for purchase price—Defence of inferiority.*

A purchaser who makes no complaint to the vendor as to the quality of goods sold, until months after the goods have been accepted and paid for, although he has complained to an agent of the vendor, who has no authority except to receive orders, cannot set up such claim in an action for the purchase price of the goods.

2. *Sale—Screened coal—Trade designation—Coal screened at mine.*

A contract for the delivery of "screened coal" is carried out by the delivery of coal properly screened at the mine, although owing to the soft and friable nature of the coal more slack is produced in transit than would be produced from coal from other mines.

W. B. Wallace, K.C., for appellant; *M. G. Teed*, K.C., contra.

ANNOTATION ON ABOVE CASE FROM 43 D.L.R.

ACCEPTANCE OR RETENTION OF GOODS SOLD.

Damages where title fails. A purchaser from one who has no title was held in Ontario to be entitled to recover as damages the value of the chattel, and not merely the amount paid therefor. In *Confederation Life Association* v. *Labatt* (1900), 27 A.R., (Ont.) p. 321, Osler, J.A., said:—

"As to the MacWillie company: they undoubtedly sold as owners, and cannot successfully deny their liability to indemnify their vendee, *Eichholz* v. *Bannister* (1864), 17 C.B.N.S. 708, 144 E.R. 284, but they contend that recovery as against them must be limited to the amount of the purchase money paid by Labatt. There is no case in the English courts or our own which expressly decides that unliquidated damages may be recovered on the breach of an implied warranty of title. In all the reported decisions on the subject, the recovery has been confined to the price paid, but in all these cases the claim was simply one to recover back money paid as upon a failure of consideration, *Eichholz* v. *Bannister*, *supra*, *Raphael* v. *Burt & Co.* (1884), Cab. & Ell. 325, *Peuchen* v. *Imperial Bank* (1890), 20 O.R. 325. In Benjamin on Sales (1899), 7th Am. ed., from the Eng. ed. of 1892, and in earlier editions published in the author's lifetime, it is said: "*Eichholz* v. *Bannister* was on the money counts and therefore, strictly speaking, only decides that the price may be recovered back from the buyer on the failure of title to the thing sold; but as the *ratio decidendi* was that there was a warranty implied as part of

the contract, there seems no reason to doubt that the vendor would also be liable for unliquidated damages for breach of warranty." In the fourth edition of Judge Chalmers' work on the Bills of Sale Act, 1893, it is pointed out that this suggestion has been adopted in that Act. In the most recent edition of Mayne on Damages (1899), the subject is not noticed. In America there is much diversity of opinion, both in the text writers and decisions. In Sedgewick on Damages, 8th ed. (1891), vol. 2, p. 492, the general rule is said to be that "the measure of damages for breach of warranty of title to a chattel is the value of the chattel at the time of the purchase, with interest and the necessary costs of defending a suit brought against a vendee to test the title, with interest from the time of payment. But the vendee may disaffirm the contract and recover the consideration paid, though that is greater than the value of the property." It is remarkable that the editors do not discuss or even refer to *Eichholz* v. *Bannister*, one of the two leading English cases on the question of an implied warranty of title, and cite only *Morley* v. *Attenborough* (1849), 3 Ex. 500, 154 E.R. 943, for the English law on the subject. In Sutherland on Damages (1882), vol. 2, pp. 418, 419, it is said: "The value of the property at the time the vendee is dispossessed has been held to be the measure of damages. Generally, however, the measure has been stated to be the purchase money and interest: thus adopting the same rule that is applied generally in estimating the damages for breach of covenants for title to real estate. . . . Where the vendee is dispossessed by suit, and has, in good faith, incurred expenses in defending it, he is entitled to recover these also from the vendor as an additional item of damages." It appears to me that the law is accurately stated in the passage quoted from Mr. Benjamin's learned work, and that the vendee, going upon a breach of the implied warranty, is entitled to recover the value of the thing he has lost in consequence of the failure of the vendor's title. Can less be supposed to have been in the contemplation of the parties when the sale was made? Why should a loss by failure of title be less fully compensated than a loss by breach of warranty of quality? The case appears to fall fairly within the general rule of the common law, as stated by Parke, B., in *Robinson* v. *Harman* (1848), 1 Ex. 850, at 855, 154 E.R. 363, at 365, that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

Conditional sale. Evidence may be given of non-compliance with warranty to reduce damages. In *Cull* v. *Roberts* (1897), 28 O.R. 591, an agreement was made for the sale of machinery, a note being taken for the price, or, rather, an agreement called a note, by which it was stipulated that if the note was not paid, or if the purchaser should dispose of his land or personal property, etc., the vendor might retake the property and sell the same, possession to be kept in the meantime by the purchaser. The defendant set up the defective character of the machinery as a breach of warranty, but was not allowed, at the trial by the County Court Judge, to give evidence of it. It was sought in the argument to distinguish between this case of a conditional sale and the case of *Abell* v. *Church* (1875), 26 U.C.C.P. 338, which was a straight sale. *Per* Boyd, C., *Tomlinson* v. *Morris* (1886), 12 O.R. 311, "is not opposed, but rather favourable to the view that in case of conditional sale of a machine, if

the price is sued for, the defendant may shew that the machine was not as warranted, and so reduce the claim by the difference between the value of the machine as warranted and its actual value in fact."

Compare *Copeland* v. *Hamilton* (1893), 9 Man. L.R. 143.

Damages governed by market price. Where the defendant failed to deliver according to contract, the plaintiff's damages were held to be the difference between the contract price and the market price. Defendants sought to reduce this amount by saying that the plaintiff had contracted to sell the goods at a lower price, so that he had not in reality lost as much as he was claiming. "But, said Osler, J., in *Ballantyne* v. *Watson* (1880), 30 U.C.C.P. 529, at 541, "this is not the way to look at it. The defendant has nothing to do with the profit the plaintiff might have made. Assuming that the plaintiff sold this cheese, he was not able to deliver it, for he had not got it from the defendant. If the sub-sale went off for that reason, the plaintiff was not thereby disentitled from going into the market and purchasing the same quantity at the market price, which was ten cents per lb., or it is perhaps not assuming too much to infer that he filled the sub-contract by the delivery of other cheese which he would have had to purchase in the market at the increased price, or to supply from his own stock, which was then worth to him ten cents per pound. In either case he would sustain a loss of four cents per lb. There seems no reason, therefore, to reduce the damages."

Notice of purpose for which goods required. Damages in such case. In *Watrous* v. *Bates* (1854), 5 U.C.C.P. 366, defendants agreed to furnish plaintiff with railway ties to enable them to carry out a contract for the supply of ties to Sykes & Co. The trial judge directed the jury that the measure of plaintiff's damages was the difference between what he was to pay defendant for the ties and the price he was to receive from Sykes & Co. Although the profits to be made on the article contracted for are in general too remote to be considered as damages for a breach of contract, this principle is subject to be controlled by the circumstances of the particular case. The words of Baron Alderson in *Hadley* v. *Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, were quoted: "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate would be the amount of the injury which would ordinarily follow from a breach of contract, under these special circumstances so known and communicated."

An attempt was made to apply this principle in *Feehan* v. *Hallinan*, (1856), 13 U.C. Q.B. 440, the purpose for which cordwood was bought being the burning of bricks, and the defendant having failed to supply wood according to his contract. Plaintiff claimed that he was entitled to recover damages occasioned by the fall in the price of bricks while he was waiting for the wood. It does not appear that the purpose for which the wood was bought was communicated, but the judgment does not seem to proceed upon this ground. It reads as if the damages would have been considered remote under any circumstances.

"The plaintiff's case shews nothing more than that he dealt with the bricks which he intended to make and burn, in the same manner that a mer-

chant would do with goods which he was importing, viz., that he took his chance and incurred the risk of a rising or falling market. In such case the mere ordinary chances of the market cannot be supposed to have entered into the minds of the parties when the bargain was made for the delivery of the wood. If the fluctuations of the market are to form an ingredient in estimating damages in such a case as the present, then the contract must be special with reference to that. The contract here is not made for bricks, in which case the rise or fall might have had some bearing upon the question, but the contract is for wood to burn the bricks, and therefore the immediate damage is that which is connected with the price of wood at that time."

Contract price of goods fifty-two dollars, damages three hundred and ninety-seven dollars. Held not excessive for failing to supply them. The contract in *Lalor* v. *Burrows* (1868), 18 U.C.C.P. 321, was to furnish 180 sets of locks of malleablized iron. Damages were claimed in a lump sum of between $700 and $800, and the jury awarded $397.50, without specifying the items allowed. The court held that there might be damages amounting to this sum and discussed the law as to the various items that might be claimed for, saying, among other things: "If the plaintiff be entitled to procure other goods by reason of the defendant's failure of contract, it makes no difference to him how little he paid, or was to pay the defendant for them, and how much he had to pay to procure or replace them. The damages the defendant may be liable to pay may be enormously beyond any profit or price he was ever to receive for his work, as in *Wilson* v. *The Newport Dock Co.* (1866), L.R. 1 Ex. 177, and as often happens when a lawyer, who was to get a few dollars for searching a title, has to pay the whole value of the property by reason of some defect which he should have guarded against; or, when a surgeon who has got a few dollars for his services, is called upon to pay for the loss of a limb, or some other misfortune which his patient has suffered from his alleged neglect, far beyond the trifling sum which was to have been his compensation."

Damages for goods not delivered according to contract. In *Colton* v. *Good* (1854), 11 U.C. Q.B. 153, 155, the plaintiff claimed as damages for the delivery of mill stones not according to the contract, the cost of endeavouring to repair the stones and expenses of dressing them and the damage done to his mill machinery by the broken stones. It was held that he could recover the cost of dressing the useless stones on the same principle as expenses incurred with respect to articles bought in the confidence that they would prove such as the vendor was bound to furnish. The cost of repairing the damage to the machinery was also allowed, the jury being satisfied that the breaking of the stones was not such an accident as could not be fairly charged against the manufacturer, but was occasioned by their not being secured by a sound and strong iron band as usual. The expense of attempting to repair the broken stones was not allowed. The plaintiff had done this on his own responsibility; he could have rejected the stones and recovered back what he had paid for them. He could not be allowed to recover back the amount paid for the stones and also the cost of attempting to repair them.

Note the difference between recovering the cost of dressing the stones under the assumption that they were such as the plaintiff was bound to accept, and the cost of attempting to repair them after it was clear that the plaintiff would be justified in refusing acceptance.

Recovery of deposit where vendor wrongfully sold goods. The plaintiff purchased cattle to be kept by the defendant until fit for the English market and paid a deposit of two hundred dollars. Defendant considered that he was not bound to keep them beyond August 20th, and insisted upon plaintiff taking them off his hands, notifying him that if he did not do so they would be re-sold. Plaintiff refusing to take them until the proper time, the defendant did sell them and claimed to retain the deposit. It was held that the plaintiff could waive the breach of the contract and sue simply for the recovery of the money paid. *Murray* v. *Hutchinson* (1887), 14 A.R. (Ont.) 489.

Purchaser must accept delivery in reasonable time. Damages for refusal. Where a specified quantity of hay was sold to be delivered at a specified place, at such times and in such quantities as the purchaser might order, it was held that the purchaser must accept the hay tendered within a reasonable time, and that the measure of damages was the difference between the contract price and the market price or value on the day fixed for delivery, or in the present case, the day when the hay was tendered to the defendant and he should have taken delivery, that being the time when the contract was broken. The plaintiff was not bound to re-sell the hay, though he might, if he thought proper, have done so and charged the vendee with the difference between the contract price and the price realized at the sale. But it would be requisite, in such a case, to show that the hay was sold for a fair price and within a reasonable time after the breach of the contract. The plaintiff was also allowed for extra expenses which he had incurred owing to the refusal of the defendant to fulfil his contract, such as labour, cartage, storage, weighing and selling the hay. *Chapman* v. *Larin* (1879), 4 Can. S.C.R. 349.

Damages for refusal to accept where the contract was to deliver wood in instalments and after one instalment had been delivered. The plaintiff in *Moore* v. *Logan* (1856), 5 U.C.C.P. 294, received as damages the difference between the contract price and the selling price "at the time the contract was broken or to be performed." These periods are not necessarily the same, but the case does not discriminate and is of no value on the question which is discussed, which is the proper time at which to take the selling price, whether it is the time when the instalments were to be delivered, or the time when the defendant refused to accept further instalments and thus broke the contract. On the whole, it is not a very valuable case.

In *Brunskill* v. *Mair* (1857), 15 U.C.Q.B. 213, the defendant failed to accept a quantity of flour delivered at Oswego, in consequence of which the plaintiff was obliged to resell. He was held entitled to recover the difference between the contract price and the price at which he had been obliged to resell at Oswego. The defendant was contending that the price at Toronto should govern, but this contention was overruled, as the plaintiff was at liberty to deliver it at Oswego.

Damages for refusing to accept deed of transfer. The plaintiff sued in an action, among other things, for the refusal to accept the deed of a vessel sold by plaintiff to defendant and of which the defendant had received possession. The jury gave as damages the whole value of the vessel and the court declined to disturb the verdict. The defendant was objecting that no title to the vessel had passed to him for want of the transfer under the provisions of 8 Vict., c. 5 but the court, held that it was not competent for him to set up

such a defence, as he had refused to accept the transfer. *Phillips* v. *Merritt* (1853), 2 U.C.C.P. 513.

A few additional cases where the subject of acceptance and rejection of goods sold has been considered may be noted.

Jacobsen v. *Peltier*, 3 D.L.R. 132, held that a rehibitory action (or action in cancellation of sale for latent defects) must be brought with reasonable diligence according to the nature of the defect and the usage of the place where the sale is made; and where there is no usage, the old French law prescription of six months from the date of the sale will be applied; also that use of the thing sold as the buyer's property, the making of extensive repairs, alterations and improvements thereto, are acts of acquiescence to the sale and will bar a resolutory action, more especially when the defendant was never notified thereof.

Ironsides v. *Vancouver Machinery Depot*, 20 D.L.R. 195, 20 B.C.R. 427, was an action for the price of railway construction dump cars and equipment, the defence being shortage and unfitness. The defendants did not advance the contention put forward at the trial for a year or more after they took delivery, the British Columbia Court of Appeal affirming the judgment of Gregory, J., held that the lapse of time before making the complaint of alleged shortage of or unfitness were elements to be considered as adversely affecting the credit to be given the evidence adduced for the buyer to sustain a defence based on such complaint.

Alabastine Company, Paris v. *Canada Producer and Gas Engine Co., Ltd.*, 17 D.L.R. 813, was an appeal from the judgment of Clute, J., in favour of the plaintiff in an action to recover $5,500 paid by the plaintiff on account of purchase-money for an engine (to be built according to specifications) bought from the defendant and alleged to be useless for the purpose intended, and for damages and for rescission. The engine was being "tried out" from September, when it was set up in respondent's factory, until the time of the breakdown in the following March. The Ontario Supreme Court (Appellate Division), affirming the judgment of Clute, J., held that when a sale of personalty not yet in existence or ascertained is made with a condition that it shall, when existing or ascertained, possess certain qualities, the "trying out" of the thing sold after delivery covering a protracted period does not constitute an acceptance against the buyer where such "trying out" was, as understood by both parties, to be for the purpose of discovering whether or not it answered the conditions of the contract.

In *Duncan & Buchanan* v. *Pryce Jones Ltd.*, 22 D.L.R. 45, McCarthy, J., of the Alberta Supreme Court, held that the buyer of goods is liable, because of his acceptance of same, if he retained them after actual receipt of same for such a time as to lead to the presumption that he intended to take possession thereof as owner.

Haug Bros. v. *Murdock*, 25 D.L.R. 666: Elwood, J., of Saskatchewan, held that where, in the sale of a traction engine, a purchaser accepts the engine and continues to use it after discovery of the defects, he is thereby precluded from later returning the engine. This case was reversed in 26 D.L.R. 200, but on the ground that as the engine was not constructed in accordance with the Steam Boilers Act (R.S.S. 1911, c. 22, sec. 19), the regu-

lations not having been complied with, the sale of the engine was wholly illegal.

In *Hart-Parr Co.* v. *Jones* (Sask.), [1917] 2 W.W.R. 888, the facts were: The receipt of an engine, the property therein not having passed, and user of it for threshing purposes for about 30 days and the signing of an acknowledgment that an expert had spent a certain number of days in repairing it and had made it satisfactory.—Lamont, J., the trial judge, held, under the circumstances, that there had been no acceptance. From August till spring could not be regarded as an unreasonable time for the rejection of an engine, the vendor by painting it having made inspection on the part of the purchaser at the time of delivery ineffective.

The following Quebec cases may also be of interest:

Macey Sign Co. v. *Routtenberg*, 48 Que. S.C. 346. A defect in the "flasher" of an electric sign consisting in the fact that it produces only a red light in place of producing simultaneously a red and white light is an apparent defect. The irregular placing of the interior wires of the sign is a latent defect, but the purchaser cannot complain of it eight months after its installation.

Martin v. *Galibert*, 47 Que. S.C. 181. When a purchaser has examined merchandise before buying, and has not objected to the price on account of its inferior quality, he cannot afterwards refuse to accept and pay for it on account of such inferiority.

Mackay v. *Temple Baptist Church*, 25 Que. K.B. 417. The buyer of a debt who, after having accepted a first transfer, received from the same seller another one containing in addition to the first, other claims against new debtors, and who instead of notifying the seller of his refusal to accept the second transfer, keeps it in his possession for several years, and meanwhile proceeds to collect the debts from the two debtors, has thereby tacitly accepted the last transfer.

Where a transfer of claims contains the debts of several debtors, and the buyer, without positively accepting, collects the debt of any one of the debtors, he accepts tacitly the whole transfer.

Southern Can Co. v. *Whittal*, 50 Que. S.C. 371. A delay of four months after the delivery of a machine is too long to refuse to accept it on account of defects. If considerable changes are made by a buyer to a machine sold and delivered, it amounts to an acceptance.

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THE VINDICATION OF INTERNATIONAL LAW.

It seems to have become a settled conviction of statesmen and lawyers that the time has arrived, and the opportunity is now before that part of the world which believes in law and order, to vindicate in a striking manner the supremacy of law.

International law has on too many occasions in the past proved a broken reed, for lack of the necessary coercive power to punish a violator of its rules. The maxim that "Kings can do no wrong" has been accepted in the past as if it were an international maxim.

It is a maxim which has its foundation purely in national, but not international, considerations. A king in his own dominions is the fountain of justice, for personal wrongdoing, he cannot be his own judge, and the only remedy is to depose him; but that rule does not and ought not to prevail as an international maxim. We know as a matter of fact that kings can, and actually do, commit wrongs on the people of other nations, and there is nothing against reason or common sense in saying that when such wrongs are committed they ought not to go unpunished.

Civilized society could not exist but for the strong arm of the policeman and the coercive powers of the law; neither can international civilized society exist in security unless the international policeman and the necessary coercive power to punish violators of international law are in some way provided.

For a large and powerful nation to attack another nation without any just cause and to kill and outrage its inhabitants or reduce them to a condition of slavery and rob or destroy their property is about as flagrant an offence against not only the law of nations, but against natural justice, as it is possible to conceive.

If in a civilized community a single person is killed or robbed or maltreated, society has not done its duty until the offender

is duly punished. Can it be reasonably said that when this offence is multiplied a thousandfold it is any less a crime? No one in his senses can pretend that offences of the kind we have mentioned can become any less essentially criminous because the offenders are more numerous.

The world knows what Belgium has been called on to endure. All the world knows that even at the very hour the crime was in process of perpetration a leading German statesman admitted that it was a wrongful act, but, forsooth, one for which reparation would be made! As if men who had been murdered in its perpetration could be recalled to life, or their violated honour restored to outraged women! No more horrible or brutal crime was ever committed by any nation on another than that committed by Germany on Belgium.

This outrage was the result of a deliberate scheme duly thought out and provided for and approved of, long before the war was started, by the ruler of Germany and his military advisers.

Can the civilized world at large ever condone such a grievous and abominable outrage? Can any reason be assigned why those who conceived and carried it into execution should not be brought to the bar of international justice?

There are some who seem to think that the laws of war exonerate the Kaiser and his statesmen and military advisers from personal liability for the acts done in carrying out their schemes—but the laws of war are designed for wars reasonably and legitimately begun and carried on; they can hardly be intended to regulate the acts of criminal violators of the peace of other peoples. The facts are that Germany had, as the German Chancellor admitted, no just ground for entering Belgian territory, and a state of war pretended to be created by the unjust invasion of Belgian territory was in the circumstances not war at all but a wanton outrage similar to that of pirates and robbers, and as far as Belgium was concerned it was simply the concerted inroad into its territory of an organized gang of murderers, thieves and cutthroats, and their acts and deeds were not acts of war or regulated by the laws of war, but by the laws that govern murderers, thieves and cutthroats. Having by unlawful violence invaded

Belgian territory, every act and deed they did there was an unlawful and inexcusable act; they could not make their position lawful merely by their successfully overcoming its inhabitants. They entered as criminals and as criminals they remained, so long as they were there, and every violation of the rights of its inhabitants in person or property was a criminal offence, according to international law.

No one can deny that if a single German had entered Belgium with a view to going to France and the Belgian authorities refused him permission, that if he thereupon proceeded to kill Belgian people he would be guilty of murder, or that if 100 Germans did so it would make no difference in the quality of their act; and if 100,000 or 500,000 do so by orders of their leader what difference can it make, except that in such a case the criminals are multiplied and that not only the individuals who engage in in the act but he who ordered them to do it become equally liable for the crimes committed?

If this be a correct view of the position of the wrongful invaders of Belgium from an international standpoint, then it inevitably follows that the trial and execution of Edith Cavell, and Captain Fryatt, were also wrongful and illegal acts and that those who were parties to their killing were guilty of murder. To pretend that these unfortunate persons were amenable to German law is to assume that the Germans were lawfully in Belgium and competent to make and execute their laws in Belgium; but as we have said, they were wrongfully there, and were no more capable in international law of rightfully making laws in Belgium than would any other gang of thieves and cutthroats.

Great Britain once sent, at great expense, an expeditionary force into the heart of Abyssinia to rescue a single British subject from unlawful imprisonment; and that she will willingly submit to the murderers of two of her people going unpunished is not very likely.

The maxim "*qui facit per alium facit per se*" is not merely a maxim of English law, it is one of those fundamental principles which are of universal application—and, according to that maxim, the ex-Kaiser and his advisers who instigated and carried out the

crime against Belgium are, and ought of right, to be regarded as though they had themselves in their own persons committed all the crimes which were committed by the German army in Belgium.

But there is not only the flagrant crime against humanity involved in the brutal invasion of Belgium and all the infamy with which it was accompanied for which the Kaiser and his principal advisers should be brought to justice, but there is also the fact that he and his advisers wilfully and maliciously promoted and brought about the war and also the many atrocities with which the war was carried on, for which they should also be made to answer. The piratical U-boat methods, the sinking of the *Lusitania* and other passenger vessels, the inhuman treatment of wounded and prisoners, the introduction of poisonous gas, the bombardment of defenceless places, etc.

Grotius lays down that the justifiable causes generally assigned for war are three: defence, indemnity, and punishment; this implies that self-defence, indemnity for loss occasioned, and punishment for wrongs suffered, are legitimate causes of war among civilized nations; but it is needless to say that not a single one of these causes existed to justify Germany levying war on Belgium. Belgium was not in any sense of the word an aggressor on German territory, or German people, it had not inflicted the slightest wrong on Germany or given in any way any just cause of offence whatever, any more than the lamb offered to the wolf. The sole ground of its offence was that it honestly and steadfastly refused to violate the terms of an existing treaty and to give aid and assistance against a nation as to whom it had undertaken to be neutral. In violating itself and attempting to induce Belgium to violate its solemn compact of neutrality, the German rulers were acting unjustly and contrary to the plainest principles of international law. How can those who have committed such an act clothe themselves with the protection of the laws of war, and justify flagitious wrongs, under the claim that they are levying war? Suppose a sovereign of one state sends into the territory of a neighbouring state a gang of murderers for the purpose of assassinating the sovereign of the latter state, and they succeed

in accomplishing their master's order, would it be reasonable to say that the murderer who had instigated and set on foot the crime was entitled to protection from punishment, on the ground either that he could do no wrong, or that he was levying war? Any such pretences ought to be regarded with contempt. He has committed murder, and if he can be brought within the jurisdiction of the law of the state, he should, and by every consideration of justice ought, to suffer like any other criminal for his crime. Would the offence be any the less or any the less amenable to the law if, instead of one man, he sent 50 or 100 to bring about the like result? A multiplicity of criminals may and often does prevent all of them from being brought to punishment, but it does not in the least diminish the guilt of all and each of them concerned. So long as the criminals remain in their own country there may be difficulty in bringing them to justice; but if they flee to other countries their surrender may be justly and rightfully demanded. Grotius very justly observes that kings and those who are possessed of sovereign power have a right to exact punishment, not only for injuries affecting immediately themselves or their own subjects, *but for gross violations of the law of nature and of nations, done to other states and subjects.* According to this view of international war, the Allied powers are well within their rights in seeking to bring to the bar of international justice the authors and promoters of the grievous wrongs and injuries inflicted on Belgium as a nation, contrary to the law of nature and of nations by the German army. The whole German nation cannot be brought to book, but the ringleaders and promoters of the crime are amenable to punishment like any other criminals.

Two or three of the principal offenders have sought asylum in other countries, and it has been suggested that they are entitled to protection as political refugees, but it is ubmitted that such a claim cannot be supported. *Quoad* Belgium they are simply criminals who have committed with force and violence outrageous crimes in Belgium contrary to the laws of Belgium. They entered Belgium unjustly, unlawfully and, contrary to international law, they proceeded to murder, rob and ravish the inhabitants; and from the moment they entered until they departed their status

was that of murderers and thieves and they by whom they were set in motion stand in the same category. The killing of Edith Cavell and Captain Fryatt were not acts of war, in the circumstances in which they were committed, but the murder of two British subjects in no way subject to the jurisdiction of those who caused them to be killed.

For every Belgian robbed, murdered or ravished the ex-Kaiser is answerable to the Belgian law as a criminal; and for every British subject put to death by Germans in Belgium the ex-Kaiser is also answerable to the Belgian law, and for these causes his extradition may properly be demanded by Belgium. As Grotius observes: "The right of demanding the surrender or punishment of criminals that have fled into other kingdoms has, in most parts of Europe during the present and the immediately preceding centuries, been generally exercised in cases where the crimes were such as affected *the safety of the state or were attended with notorious atrocity*," both of which circumstances exist in the case in hand.

The right of asylum which is extended to some refugees is, as Grotius lays down, for the "protection only of those who are the victims of unmerited persecution, not for those who have committed crimes injurious to mankind and destructive to society." Under this excepted class to some extent come those who in the carrying out of political designs in their own country have resorted to deeds of violence and then escaped to some other country, but even such offenders are not in all cases entitled to protection from extradition.

The question of extradition of criminals is among civilized nations now usually the subject of express treaty stipulations, and between Belgium and Holland we assume such a treaty exists, that it provides for the extradition of murderers, robbers, thieves and the perpetrators of rape we have no doubt, and to this class of criminals the ex-Kaiser and his son now in Holland may properly be assigned, and their extradition may be rightfully claimed by Belgium for their violations of Belgian law.

But the acts of the ex-Kaiser and his advisers have in many other respects been flagrant violations of the laws not only of

nature, but of nations. They have deliberately and of malice aforethought carried on the war as against Great Britain and France in violation of the well understood laws of war, and with the deliberate purpose and intent of making it as frightful as possible, and it may well be that for such offences against humanity an international tribunal should be convened before which the culprits should stand their trial, and receive in their own persons the punishment which that tribunal may see fit to award.

It is not very material to the world whether the ex-Kaiser and his associates are tried as ordinary criminals by the Courts of Belgium or by some special international tribunal to be convened for the purpose. What all civilized humanity is concerned in, is that before some tribunal they shall be arraigned, and receive a just trial, and a just sentence for all the infamy of which they have been guilty.

As far as the personal guilt of the ex-Kaiser is concerned, he seems to have furnished evidence under his own hand in a letter quoted by the French jurists who have been recently investigating the legal aspects of his responsibility. The letter in question was written by the ex-Kaiser to the former Austrian Emperor in the early days of the war, in which he said: "My soul is torn asunder, but everything must be put to fire and blood. The throats of men and women, children and the aged must be cut, not a tree, not a house left standing. With such methods of terror, which alone can strike so degenerate a people as the French, the war will be finished before two months, while, if I use humanitarian methods, it may prolong for years. Despite all my repugnance, I have to choose the first system." How it was actually carried out in Belgium and Northern France, all the world knows, and a halter appears to be the only proper medicine for such a criminal.

SOLICITORS' BILLS OF COSTS.

For some years there has undoubtedly been a growing feeling among the members of the profession that a change in the method of preparing solicitors' bills of costs was necessary to meet modern conditions. It has been felt, as aptly expressed by an eminent

Ontario Judge, that the remuneration of the professional man "can be better estimated by the result attained and the care and skill shewn in what is done, than by any summation of items each attached to an individual move in the game played with living persons." Solicitors have thought that the magnitude of the interests involved for the client should have some bearing on the amount of the charge they are entitled to make. This feeling has been evidenced by the tariffs adopted by various County Law Associations, providing for fees proportionate to the value of the property dealt with, the amount of the capital of companies incorporated, etc. It also appears in the somewhat general practice followed by many solicitors when delivering bills to their clients, of setting out in detail the services rendered and charging at the end of the bill what is called a "lump fee" to cover all. It has, however, been almost universally accepted that the law did not recognize the principle of the County Association tariffs, and the "lump fee" bill, and that if trouble arose between the solicitor and his client necessitating taxation or suit to recover the amount charged, the solicitor, if required, must furnish detailed charges. The very recent decision of the Second Appellate Division of the Supreme Court of Ontario, in the case of *Lynch-Staunton* v. *Somerville*, 15 Ont. W.N. 303, reversing the same case in 43 O.L.R. 282, is one of much interest to the profession at large, and will undoubtedly have a marked bearing on the form taken by bills of costs hereafter delivered by solicitors to their clients. The result of the decision would appear to be that in, at all events, the majority of bills, detailed charges are unnecessary for the purposes either of action or taxation.

When the importance of the question to the profession is considered, it is somewhat surprising that there are not more reported decisions on it than can be found in the reports. The cases where the solicitor has been allowed to charge by way of "lump fee" or on a commission basis are very few. Among the earliest in Ontario are *Re Richardson*, 3 Ch. Ch. R. 144, and *Re Attorneys*, 26 U.C.C.P. 495. The basis of these decisions appeared to be that the percentage principle might be applied where the work done by the solicitor was similar to that of an ordinary

agent acting in connection with the sale of property and the receiving, investing or otherwise disbursing of moneys. It by no means followed that the services of solicitors in business, purely that of a solicitor, could be remunerated according to any such measure.

A break away from the general idea of what was necessary to a proper bill of "costs, charges and disbursements" under the Solicitors' Act, was thought to have been accomplished by the decision of the late Chancellor, affirmed by the King's Bench Divisional Court, in *Re R. L. Johnston*, 3 O.L.R. 1. In that case a lump fee was allowed the solicitor for difficult and complicated negotiations out of Court with various insurance companies, resulting in the collection for the client without litigation of upwards of $70,000. The decision, however, was not altogether satisfactory, and appeared not be applicable in more than a very limited number of cases. The Chancellor in justifying the lump fee allowed, pointed out that "the circumstances surrounding the professional employment were very exceptional, and justified the somewhat liberal allowance ascertained upon the reference." In addition to this, a basis for the judgment of the Divisional Court appeared to be found in the statement that the client himself had issued the order for taxation. It has been held from an early date that the time for a client to object to the form of the solicitor's bill is when the order for taxation is obtained, and not when the matter comes before the taxing officer. Emphasis appears to have been placed on this last feature by the Second Appellate Division in the case of *Gould* v. *Ferguson*, 29 O.L.R. 161. This case was considered by many as in conflict with the *Johnston case*, and a getting back to the necessity of individual items with separate charges. If the two cases were in conflict, the later of course governed. The bill in question in the *Gould* case was wholly for "Conveyancing, attending registry offices, examining deeds, letters, searching executions, etc.," but no point appears to have been made of this in the reasons for the judgment of the Court, which was taken as a general holding, in the words of the headnote to the report, that the requirements of the Solicitors' Act are "not complied with by the delivery of a bill of costs, charges and dis-

bursements, in which the amount for each service is not stated, but a lump sum charged." The doubt as to the effect of the *Gould* case on the *Johnson* case has been done away with by the judgment just delivered. "In *Gould* v. *Ferguson*, we did not—and did not affect to—overrule *Re R. L. Johnston*," *per* Riddell, J.

To understand the present position of the law on the whole question, it is necessary to look at the nature of the services rendered and the form of the bill delivered in the *Staunton* case. The facts as set out in the reasons for judgment of the Hon. Mr. Justice Riddell are that the defendant Somerville had certain property in Hamilton which he sold and his purchaser sold to the Canada Grocers. Somerville claimed that he had the right to re-purchase within a certain time, and he wished to do so. He saw the plaintiff, who wrote the owners, but they denied his alleged right, as did the Dominion Canners, who had an interest with the Canada Grocers. It was determined to issue a writ; the plaintiff told the defendant that he did not practice as a solicitor, and he retained Mr. C. as solicitor who issued a writ. Considerable negotiations took place which resulted in a settlement, whereby Somerville was to have the property for $30,000. This settlement was carried through. The bill as delivered to the client contained "53 items of ordinary law services for which a fee might be charged; 39 of these have a fee charged. Then there are 2 charges of a kind not quite usual, but in no way extraordinary." "Fee on revising deed, examination of title, closing transfer of property, etc., amount paid on settlement $30,000," for which a charge of $165 is made; and "Fee on negotiations as above set out, and recovering property of the value of $60,000, subject to a payment of $30,000, charged at $700. There are 14 items against which no charge is made, and there are also 7 items which merely state receipt of letters and the like, which of course have no charge. On the 14 against which no fee is entered, there are 2 letters, 10 attendances and consultations, etc., one draft proposal and one telephoning, all apparently during the negotiations for settlement and being 'the negotiations above set out,' referred to in the $700 item." Where the solicitor had interviews with the client personally, separate amounts were

charged. The consultations for which no charges were carried out, were consultations with solicitors acting in interests adverse to those of the client.

It would appear that the bill in question covers services similar to those rendered by the solicitors in both the *Johnston* and *Gould* cases—negotiations out of Court leading to a settlement as in the *Johnston* case, and conveyancing work (necessary to carry out the settlement) as in the *Gould* case. It includes, as indicated, a lump fee for the negotiations and also a lump fee for the conveyancing. It was thought by the trial Judge (Masten, J.), that the lump fee for the negotiations could not be justified in view of the decision in *Gould* v. *Ferguson*, but he appears not to have specifically dealt with the lump sum charged for the conveyancing. The Appellate Court, however, has now held that both charges were proper and that the bill as a whole complied with the requirements of the Act. The holding so far as the fee on the negotiations is concerned is in accord with *Re R. L. Johnston*, which must now be taken as settled law.

It is not easy to reconcile the decision on the charge for conveyancing work with the judgment in *Gould* v. *Ferguson*. It is said that "The present bill has no resemblance to the bill in question in *Gould* v. *Ferguson*." That seems true of the bill as a whole, but the charge of $165 to cover "Fee on revising deed, examination of title, closing transfer of property, etc.," would appear to be for work identical to that of the solicitor in the *Gould* case. Can it be that if the last mentioned solicitor had, instead of taking a page and a half to set out what he had done, boiled his charge down to the form given above, the decision of the Appellate Division would have been that his bill was a proper one within the meaning of the Act? Such a proposition would appear to be unthinkable, yet it is submitted it must follow from the decision under consideration.

As shewing how the rule works out, reliance is placed by the Court on *Blake* v. *Hummell*, 51 L.T.N.S. 431. It is said that the bill in that case so far as material read:—

"The Rev. F. H. Hummell to Edwd. F. Blake.

"1881—Oct. and Nov.—Perusing abstract of the title to

Wilcot Lodge, Shanklin. Instructions for requisitions on the title and drawing same and fair copy. Perusing Mr. Harper's replies thereto. Instructions for assignment. Drawing same and fair copy for perusal. Engrossing same, and journey to London to examine the abstract, and completing purchase, including attendances and correspondence with you and Mr. Harper and Messrs. Dean and Taylor, including travelling and hotel expenses.....£38 10s.

"1882—April 1. Yourself ats Urry. Attendances on you in reference to this case on which you were summoned for an assault, and conferring thereon and receiving your instructions to attend the petty sessions on the hearing of the case, and attending accordingly on your behalf, when the magistrates considered an assault had been committed and fined you in the penalty of 2s. 6d. and costs.....£2 2s."

Mr. Justice Denman considered the charge of £2 2s as being sufficiently specific, and a charge that could be fairly taxed by the taxing master. Mr. Justice Riddell points out that there were included in this charge:

1. An attendance on client when retained.
2. Instructions to defend before Magistrate.
3. Attending before Magistrate at the trial.

And he accepts the item of $165 in Mr. Staunton's bill as being "just as specific and as fairly taxable as that passed upon by Denman, J." The charge of £38 10s was held to be insufficient. The learned Judge's reasoning seems difficult to follow, when he selects the item for conveyancing business in the bill before the Court as being similar to the item for criminal business in the *Blake* v. *Hummell* bill instead of treating it as similar to the item in the older bill for what must have been apparently exactly similar conveyancing charges.

It is understood that the *Staunton* case is not likely to go further. It will stand as binding in the Provincial Courts in future cases of solicitors' bills. It is submitted as already indicated that in a large majority of matters, it will not be necessary for solicitors to render detailed bills. A great deal of a solicitor's business consists of negotiations such as are dealt with in the *Johnston*

case; and of conveyancing work. The solicitor will be at liberty in matters of negotiation to charge a lump fee, in the fixing of which there can be taken into consideration the magnitude of the interests involved. In connection with real estate work, sanction is apparently given to the principle underlying the County Association tariffs. When a client brings to a solicitor an agreement to purchase real estate which has been signed by him, for the purpose of having the solicitor put through the transaction, it will apparently not be necessary for the solicitor to render a bill shewing in detail the whole time spent in connection with the matter and each step taken in bringing it to a conclusion. It would seem that it will be sufficient if he renders a bill with one item somewhat as follows:—"Fee to cover searching title, revising deed, and closing purchase of property to the value of $....." This undoubtedly is a great step in advance, so far as the profession at large is concerned. It seems, however, to be a logical result of the recent decision, and, after all, it is results that count.

PUNISHMENT BY FINE.

In the day when the cares of state consisted chiefly in devising new methods of compelling the subject to contribute to the royal revenues, the punishment of crime by fine was deemed a very happy invention. No nice theories of reformation or determent marred the regal satisfaction with the device; it was sufficient that it got the money. By sheer force of tradition this device of impecunious kings has survived to an age in which the raising of revenue is a secondary interest of government. Viewed as a measure of reformation punishment by fine is of course an absurdity.

As a deterrent, it is deprived of most of its value by its inevitable inequality. To the proprietor of a family flivver, the possibility of a twenty dollar fine is an adequate deterrent against speeding. To the class of drivers by whom most of the speeding is done it is no deterrent at all.

As applied to violations against regulations of business, the fining system, unless the fine is so large as to exceed by far the

possible profits of the illegality, becomes in effect a license to commit crime. Take, for example, the fines imposed on dealers who disobeyed the Government price regulations.

If there ever was a crime which deserves capital punishment it is profiteering in the necessities of life during war time. It embodies all the moral elements of treason and springs from a motive more sordid than that which ordinarily animates the traitor. The murderer may kill from passion, the anarchist may plead a real though misguided sympathy with the sufferings of the poor, but the profiteering merchant weakens the resources and the morale of the country for his own financial gain. To a lesser degree, the merchant who in time of peace gives short weight or adulterates a food product is guilty of a crime involving more moral turpitude than most felonies for which men are sent to the penitentiary. Moreover, by a climax of irony, in such cases the fine imposed does not come out of the culprit but out of his victims. Even if it exceeds the past profits of his illegal dealing, which is rarely the case, it merely incites him to more cunning fraud until he can make the ultimate consumer pay the balance. As a general rule, any offence which is adequately punished by a fine does not merit punishment at all. There are some minor offences of which cognizance must be taken for which a sentence of imprisonment is excessive. In such a case the methods of the juvenile court should be adopted, the offender being released on parole and required to report from time to time until he satisfies the Court that there is no likelihood of his repeating the offence. Minor crimes spring from an inadequate sense of social duty and such treatment would do far more to awaken that sense than the imposition of a fine. If it fails and the crime is repeated, imprisonment would then be merited.—*Law Notes.*

SUCCESSION DUTIES ACT.

The issue of Government bonds which are not subject to the duties imposed by the Succession Duties Acts of the various Provinces is a matter which might well engage the attention of our Legislatures, in reference as well as to securing uniformity in our laws as to the objectionable nature of this exemption.

A small loan we are told is required by the Government of the Province of Quebec, sought to be obtained by the sale of 4½% gold bonds issued in the usual way. One of the inducements held out to investors is that these bonds are not subject to the duties imposed by the Province under the Succession Duties Act.

Whilst there are objections to the principle of this tax, and innumerable difficulties and much injustice in its collection, it is generally received as a wise and desirable mode of raising revenue. This being so, there should be nothing done by the Government to neutralize what is claimed to be beneficial by making an exception which militates against the main intent of the tax, for the purpose, or, at least, with the result of benefiting those who can afford to invest large sums of money, and be free from the burden which others have to bear.

It is true that every citizen in a Province derives a benefit from the fact that his Province can borrow money for public purposes at a low rate of interest. This benefit accrues, of course, to all classes alike; but those who can, as we have said, afford to put away and invest in Government bonds, get a direct benefit which does not accrue to those whose means are only sufficient to pay for a reasonable livelihood, or who, perhaps, can put away a few dollars in a savings bank.

We would call attention to another matter. The inducement this exemption holds out is a direct invitation by the Government to the investor, and therefore to the wealthy classes, to avoid the burden of a tax imposed by that same Government, which was imposed for the very purpose of doing something for the general benefit of the community, but which that Government now seeks to nullify. The success which has attended the efforts of the scheme of our Finance Minister for raising money for war purposes from the people of the Dominion of Canada, instead of borrowing elsewhere, is likely to be followed very largely, so that we may expect to see in the future, further and larger Provincial issues to be taken up by our own people. If all these securities are to be free from Succession Duties, we shall see a large reduction in that source of revenue.

We have no sympathy with destructive Socialism; but desiring to be fair to all, we would suggest a campaign to prevent this objectionable frittering away of which is generally understood to be a desirable tax.

ROYAL MARRIAGES.

In these democratic days, and England being the exponent of the best type of democracy, it is interesting to recall legislation dealing with the above subject. It comes before us in the pleasing incident referred to in the following article in the *Law Times* (Eng.):—

The announcement in the *Court Circular* of the 27th ult. of the betrothal of H.R.H. Princess Victoria Patricia of Connaught to Commander the Hon. Alexander Ramsay, R.N., is accompanied with the statement that the King and Queen have received the "gratifying intelligence," and that the King "has gladly given his consent to the union." The consent of the Crown to this marriage, couched in words which convey the most cordial approbation, is not a mere gracious formality. It is an essential condition precedent to such a marriage under the provisions of the Royal Marriage Act, 1772, which was a measure most strenuously opposed on constitutional grounds and productive of momentous results. On the 24th March, 1772, the Royal Marriage Act was passed; the powers were characterised by Lord Chatham as "tyrannical," while Horace Walpole said "never was an Act passed against which so much and for which so little was said." The Act provides that no descendent of George II. (except the issue of princesses married into foreign families) should be capable of contracting matrimony without the King's previous consent signified under his sign manual and declared in Council, and that any marriage contracted without such consent should be null and void. There is a proviso, however, enabling members of the Royal Family who are twenty-five years of age to marry without the King's consent after having given twelve months' previous notice to the Privy Council, unless in the meantime both Houses of Parliament should signify their disapprobation of the marriage.

Sir Erskine May thus comments on this enactment, for whose modification the changes produced by the war supply grounds: "The arbitrary character of the Act was conspicuous. It might be reasonable to prescribe certain rules for the marriage of the Royal Family, as that they should not marry a subject, a Roman Catholic, or the member of any Royal House at war with this country, without the consent of the King; but to prescribe no rule at all, save at the absolute will of the King himself, was a violation of all sound principles of legislation. Again, to extend the minority of princes and princesses to twenty-five created a harsh exception to the general law in regard to marriages."

THE ABOLITION OF LAW COURTS.

Those who have read Shakespeare's account of the rebellion of Jack Cade may remember the bloodthirsty proposal of Dick the butcher, a follower of Cade: "The first thing we do, let us kill all the lawyers"; to which Cade replied, "Nay, that I mean to do." Other instances, we are sorry to say, are to be found in history and fiction of this unreasoning dislike of the profession, particularly that of the Emperor Napoleon I., who, no doubt, regarded the Bar as a serious obstacle to the exercise of arbitrary dominion. One of the latest instances is that of the extremists in Russia, who have, it seems, made a decree abolishing all law Courts from the Senate to the County Courts, and have even proceeded to the abolition of the Bar. If, however, the statement of Shylock is true, "You take my life if you do take the means whereby I live," a formal decree for the abolition of the Bar was scarcely necessary, as its existence could not be separated from that of the Courts. And whatever may be the opinion of a fluctuating body of revolutionists, it may be contrasted with that of the English-speaking communities of the world, in all of which the highest political honours have been obtained by members of the Bar. It may be added that the Russian example is hardly likely to be followed in Germany, where there are signs that the revolution will proceed in an orderly manner. And the influence of a long line of dis-

tinguished jurists should count for a good deal, though that is not conclusive, for Russia has names eminent in jurisprudence as well. In any case, the interruption of the normal processes of law, and of the study and practice of the law, can, in a civilized country, only be temporary.—*Solicitors' Journal.*

JUDGES AND COUNSEL.

On the relations between Judges and counsel Mr. Strahan has some good stories to tell, though they suggest perhaps an over-readiness on the part of counsel to keep the Judge in his place. "Gentlemen of the jury," said Curran, who was annoyed at the Judge repeatedly shaking his head to indicate dissent, "you may have noticed his lordship shaking his head. I ask you to pay no attention to it; because if you were as well acquainted with his lordship as I am, you would know that when he shakes his head there is nothing in it." And the stories which Mr. Strahan gives of Lord Russell's treatment of Judges when, as Sir Chrales Russell, they interrupted him needlessly, seems to tell as much against the manners of the Bar as against the fussiness of the Bench. We prefer the more pointed reproof of the late Mr. Oswald, who, when told by an irritated Judge that he could teach him neither law nor manners, blandly answered, "I respectfully agree, my lord; you could teach nobody either." And yet we doubt whether any such retort was ever actually made in the serene atmosphere of the Chancery Division. At any rate, it would be taken as what it was meant for—a somewhat daring jest, and would be accepted the more readily from Mr. Oswald, who was known not only for his "Contempt of Court," but for his quite correct answer to the judicial inquiry, "What brings you here, Mr. Oswald?" "Two and one, my lord," and that settled the matter. For peppery Judges Mr. Strahan makes use of Sir Pepper Arden, afterwards Lord Alvanley, and the comment of the French visitor for whom his name was translated as "*Le Chevalier Poivre Ardent.*" *Parbleu,*" he muttered, "*il est tèrs bien-nommé.*" But the talkative Judge has been rebuked once for all by the great authority, Lord Bacon, to whom we have already referred,

and it is impossible to refer to judical bearing without having the "Essay on Judicature" in mind. "An over-speaking Judge is no well-tuned cymbal. It is no grace to a Judge, first to find that which he might have heard in due time from the Bar, or to shew quickness of deceit in cutting off evidence or counsel too short, or to prevent information by questions though pertinent." All this, however, is outside the real everyday relationship of Bar and Bench, which is one of quiet co-operation in the administration of justice. Mr. Strahan—may we say, as in the "Bidding Prayer," "as in private duty bound"—commends as the best example of this the ordinary relationship of a Chancery Judge and the leaders of his Court, by which business is so much facilitated, "The Judge trusts implicitly to the word of counsel, and his trust is never betrayed;" though neither Mr. Strahan nor ourselves would suggest that this rule of conduct is confined either to the inner Bar or to the Chancery Division.—*Solicitor's Journal.*

COUNSEL AND CLIENTS.

The relation of counsel to their lay clients is always something of a mystery to the latter. The client cannot understand the exertions of his advocate without believing that he takes a special and personal interest in the case. And yet the mastery of the facts is but for a brief period. They are forgotten as soon as learnt. A junior counsel was suddenly brought into a case in which Sir Charles Russell had already appeared in on several occasions. He was surprised that his leader relied on him for the facts. "I know nothing about it," said Sir Charles. "But," replied the junior, "you have argued it three times already." "I tell you I know nothing about it," answered Sir Charles angrily. "If I remembered all the facts in all the cases I have been in, what sort of a thing would my head be now, do you think?" But, as Mr. Strahan says, the superficial knowledge which counsel cram up has "usually vast *lucunæ* in it, which, when discovered, reveal the abysmal ignorance which lies behind"—an ignorance which may well be disastrous when technical knowledge is in

question, as in a patent case. And so we are not surprised at the story of Lord Kelvin (then Sir William Thomson), the great authority on electricity, who agreed with the consecutive questions of counsel, each assuming what seemed a necessary result of the preceding up to a certain point; but at length to a final question, "Wouldn't you say that so-and-so must of necessity follow from that?" he replied, after a pause, "I wud—if I knew nothing about electricity, but I know a deal." And that cross-examination went no further. The idea that an advocate should only take up a cause in which he believes is, according to Mr. Strahan, at the bottom of the popular distrust of lawyer politicians—a distrust which he says is wholly impersonal, and rarely damages individual counsel who take to public life. We have only to glance at the personnel of the political world to see the truth of this remark. But whatever may be the ethics of the lawyer politician, in his professional life his business is to do the best he can for his client. If he wins, so much the better for his client and himself. For success in winning causes is the best passport to success in the profession. But if he loses, he takes the result philosophically. We have, we are afraid, laid Mr. Strahan's article under somewhat heavy contribution, but we are very far from having exhausted either its stories or its interest. —*Solicitor's Journal.*

Are executors justified in going to the expense of a tombstone? This question is discussed in a recent number of the *Law Times* (Eng.), vol. 146, p. 93. The general rule, as laid down in *Stagg* v. *Prenter*, 3 Atk. 119, is to the effect that executors are justified in incurring such expenses in connection with the funeral of the deceased as his estate and degree demand. In a more recent case (*Goldstein* v. *Salvation Army Assurance Society*, 117 L.P. Rep. 63, (1917) 2 K.B. 291) Mr. Justice Rowlatt, while admitting that a tombstone, like mourning, is not generally to be considered as a funeral expense, does not definitely hold that it is not. Under these circumstances it may be desirable to insert a provision in a will authorising executors to go to the necessary expense for that purpose if so desired.

REVIEW OF CURRENT ENGLISH CASES.

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BILL OF EXCHANGE—FORGED BILL OF LADING ATTACHED TO BILL OF EXCHANGE—PRESENTMENT FOR ACCEPTANCE—WARRANTY OF GENUINENESS OF BILL OF LADING ATTACHED—REPRESENTATION—MISTAKE OF FACT—FAILURE OF CONSIDERATION—RIGHT TO RECOVER MONEY PAID BY ACCEPTOR.

Guaranty Trust Co. v. *Hannay* (1918) 2 K.B. 623. This was an appeal from the decision of Bailhache, J. (1918) 1 K.B. 43 (noted ante vol. 54, p. 149). This much litigated case arose out of the fraud of certain cotton brokers in the United States. The defendants were dealers in cotton and purchased 100 bales from Knight Yancey Co. for £1,464 9s., and in payment of the price delivered to the sellers in the United States a bill of exchange drawn on a Liverpool bank for the amount of the price. The plaintiffs, who were dealers in foreign bills of exchange, purchased the bill in good faith, having a bill of lading attached. The bill of exchange on its face shewed that it was given for $\frac{100}{\text{R.S.M.I.}}$ bales of cotton which were the bales referred to in the bill of lading. The bill of exchange, with bill of lading attached, was sent by the plaintiffs to England and there paid on presentation by the drawees, after the defendants' agent had inspected the bill of exchange and bill of lading, and expressed himself satisfied therewith. It subsequently turned out that the bill of lading had been forged by Knight Yancey Co. The defendants thereupon brought an action in New York against the plaintiffs to recover the amount paid on the bill of exchange. In that action the New York Court held that, according to American law, the bill of exchange was not an unconditional undertaking to pay, but was contingent on the bill of lading being genuine; but it was ultimately decided in that action that the case was governed by the law of England. In order to save the expense of getting expert evidence as to the English law the defendants in the New York action brought the present action in order to obtain a declaration as to their rights in the premises, and the defendants counterclaimed for the relief which they had sought in the New York action. Bailhache, J., held that the case was governed by American law, and applying that law as laid down in the New York action dismissed the action and gave judgment for the defendants on their counterclaim. The Court of Appeal (Pickford, Warrington, and Scrutton, L.JJ.) were

of the opinion that the case was governed by English law, and that according to that law there was no implied guaranty by the plaintiffs of the genuineness of the bill of lading, and therefore that they were entitled to the declaration asked and to a dismissal of the counterclaim. Their Lordships also discussed the question from the standpoint of American law, and do not think that the decision of the American Courts on which Bailhache, J., relied, really support his conclusion as to their effect.

PRACTICE—STRIKING OUT PLEADINGS—ACTION AGAINST SERVANT OF CROWN—CONTRACT BY SERVANT OF CROWN ON BEHALF OF CROWN—DECLARATORY JUDGMENT—ACTION OR PETITION OF RIGHT.

Hosier v. *Derby* (1918) 2 K.B. 671. This was an action against a servant of the Crown to obtain a declaratory judgment to the effect that the plaintiffs were entitled to compensation as against the Crown for the acts of the defendant in breach of a contract made by him on behalf of the Crown. The defendant moved to strike out the statement of claim on the ground that the action was not maintainable. The Master, to whom the application was made, granted the order asked, but Coleridge, J., on appeal, set it aside—and this was an appeal from Coleridge, J. The Court of Appeal (Eady, M.R., and Scrutton and Duke, L.JJ.) allowed the appeal. The plaintiffs relied on *Dyson* v. *Attorney-General* (1912) 1 Ch. 158, but Eady, M.R., who delivered the judgment of the Court, said: "I am of opinion that an action can no more be brought against a servant of the Crown for a declaration as to what a contract means than it can be brought for a substantive remedy on the contract." For the defendant it was argued that the plaintiffs' remedy, if any, was by petition of right, and though the Court of Appeal expresses no opinion on that point, it seems probable that that argument is correct.

DEFAMATION—LIBEL—PRIVILEGE—MATTER OF COMMON INTEREST —ABSENCE OF MALICE—LETTER TO FIRM—PUBLICATION TO CLERKS—LOSS OF PRIVILEGE.

Roff v. *British & American Chemical Co.* (1918) 2 K.B. 677. This was an action for a libel which was written and sent in the following circumstances: The defendants had a dispute with a firm named Mann & Cook, which, it was proposed, should be referred to arbitration. Mann & Cook proposed the plaintiff as their arbitrator. The defendants objected to the appointment,

and wrote and sent a letter to Mann & Cook containing the libel in question. The letter was opened in the ordinary course of business by one clerk, and by him handed to another, who handed it to one of the firm. The defendants pleaded privilege. At the trial the jury found the letter was a libel and that there was no malice, and assessed the damages at £50. On these findings Darling, J., gave judgment for the plaintiff, but the Court of Appeal (Eady, M.R., and Scrutton, and Duke, L.JJ.) held that the letter was concerning a matter in which the parties had a common interest and that the occasion was privileged, and that the privilege was not lost by the publication to the clerks of Mann & Cook. The Court thereupon dismissed the action.

DEFAMATION—LIBEL—PUBLICATION OF LIBEL BY PRINCIPAL TO HIS AGENT—DOCUMENT CONTAINING LIBEL MISLAID BY AGENT—DISCOVERY OF LIBEL BY PERSONS LIBELLED—CONSEQUENT RECOVERY OF DAMAGES AGAINST PRINCIPAL—LIABILITY OF AGENT TO PRINCIPAL—PRINCIPAL AND AGENT.

Weld-Blundell v. *Stephens* (1918) 2 K.B. 742. This was an action by principal against his agent to recover damages for alleged neglect of duty in the following circumstances: The plaintiff wrote a letter to the defendant, as his agent, which contained a libel on three persons. The agent handed the letter to his partner and asked him to carry out the instructions contained in it. The defendant's partner left the letter on the table of one of the persons libelled, whereby he and the other two persons became aware of the libel and then brought an action against the plaintiff and recovered damages against him for such libel. The plaintiff claimed to recover against the defendant the damages he had been thus compelled to pay, alleging that the defendant had committed a breach of his duty in thus allowing the letter to come to the knowledge of the parties libelled. The action was tried with a jury who found that it was the duty of the defendant to keep the letter secret, and that he had neglected the duty, and that the actions brought against the plaintiff were so brought in consequence of the defendant's negligence. Notwithstanding these findings, Darling, J., held that the contract between the plaintiff and defendant did not contain any implied term such as alleged by the plaintiff, and that no breach of contract or dereliction of duty had been committed by the defendant, and whether or not this was so, the plaintiff could not recover against the defendant because he had had to make reparation for a wrong committed by himself. The jury seem to have taken the commonsense point of

view that an agent, like a solicitor, is bound to secrecy in regard to communications from his principal, and we are not sure whether the jury's law is not on the whole preferable to that of the Judge.

ARBITRATION—AWARD IN ALTERNATIVE FORM—SPECIAL CASE—FINAL AWARD IF SPECIAL CASE NOT PROSECUTED.

Re Olympia Oil & Cake Co. v. *MacAndrew* (1918) 2. K.B 771. This was an appeal from an order of a Divisional Court dismissing a motion to set aside an award. The award in question was made in an alternative form; it stated a special case and limited a time within which the case should be set down for hearing; and in default it made a final award of the matters in question. The Court of Appeal (Banks, and Scrutton, L.JJ., Pickford, L.J., dissenting) that the arbitrators had not exceeded their jurisdiction and held that the award was not bad on its face and dismissed the appeal.

LANDLORD AND TENANT—LESSEE OF APARTMENTS—FLIGHT OF STEPS FROM STREET—OBLIGATION OF LESSOR TO KEEP STEPS IN REPAIR.

Dunster v. *Hollis* (1918) 2 K.B. 795. The plaintiff in this case was the lessee of two rooms in a house; the lessor retained control of the rest of the house and of the front steps. These steps had been suffered to fall into disrepair and the plaintiff, in using them, fell and was injured. Lush, J., held that the defendant was under an obligation to the plaintiff, as his tenant, to take reasonable care to keep the steps reasonably safe, and that he had failed in this duty and was liable to the plaintiff for damages for the injury thus occasioned.

LANDLORD AND TENANT—NOTICE TO QUIT ACCOMPANIED BY LETTER THAT IT WAS TO TAKE EFFECT UNLESS IN MEANTIME THE LESSORS SAW FIT TO CHANGE THEIR OPINION.

Norfolk v. *Child* (1918) 2 K.B. 805. This was an appeal from the order of a Divisional Court (1918) 2 K.B. 351 (noted *ante* p. 24). The question was to the sufficiency of a notice to quit, accompanied by a letter, to the effect that it was to take effect unless in the meantime the lessors saw fit to change their opinion. The Divisional Court upheld it and the Court of Appeal (Bankes and Scrutton, L.JJ., and Eve, J.) affirmed the decision.

HIRE-PURCHASE AGREEMENT—OPTION TO PURCHASE—SALE BY HIRER—ASSIGNABILITY OF CONTRACT—DETINUE—CONVERSION—MEASURE OF DAMAGES.

Whiteley v. *Hill* (1918) 2 K.B. 808. We are glad to find that the Court of Appeal (Eady, M.R., and Warrington, and Duke, L.JJ.) have seen their way to reversing the judgment of a Divisional Court (Salter and Roche, JJ.) in this case (1918) 2 K.B. 115 (noted *ante* vol. 54, p. 432). The action arose out of a hire-purchase agreement made in regard to a piano by the plaintiff with Miss Nolan. Under the agreement the hirer had an option to purchase the piano paying the price in instalments and until the price was fully paid she was to be bailee of the piano for the plaintiff. Before the price was paid Miss Nolan sold the piano to the defendant. The plaintiffs brought the present action for detinue and conversion and claimed to recover possession of the piano or its full value. The defendant paid into Court the full amount of the balance due on the price and the Judge of the County Court, who tried the action, dismissed it. The Divisional Court held that the sale by Miss Nolan amounted to a repudiation of the agreement and therefore that the plaintiffs were entitled to recover possession of the piano or its full value. The Court of Appeal, however, held that the Judge of the County Court was right and restored the judgment pronounced by him.

INSURANCE—FIRE CAUSED BY "WAR BOMBARDMENT, MILITARY OR USURPED POWER"—REBELLION IN IRELAND—WARFARE BETWEEN FORCES OF CROWN AND "USURPED POWER"—BOMBARDMENT BY CROWN FORCES—DAMAGE TO INSURED PREMISES.

Curtis v. *Mathews* (1918) 2 K.B. 825. This was an action on a policy of fire insurance to recover for loss by fire occasioned by bombardment of premises by forces of the Crown to quell Irish rebellion. The policy covered loss by fire "directly caused by war bombardment, military or usurped power," whether originating on the premises or elsewhere. The policy, however, also contained a proviso that no claim was to attach for "destruction by the Government of the country in which the property is situated. During the currency of the policy certain persons styling themselves a Provisional Government proclaimed an Irish Republic and occupied with armed forces the Post Office and other public buildings in Dublin. The Post Office was bombarded by the Crown forces and as a result caught fire which spread and de-

stroyed the insured premises. Roche, J., who tried the action, held that the loss was covered by the policy, and that the proviso only related to an intentional destruction of property by the Government.

GUARANTY—SURETY—PAYMENT ON DEMAND—NECESSITY OF DEMAND—STATUTE OF LIMITATIONS—NOVATION.

Bradford Old Bank v. *Sutcliffe* (1918) 2 K.B. 833. This was an action to enforce a guaranty in the following circumstances: In 1894 the plaintiff agreed to make a loan of £3,600 to a company, and to allow the company to make an overdraft of £2,500 upon the security of £6,100 of debentures and the guaranty of the defendants, two of the directors. The debentures were deposited and the defendants gave the plaintiffs a guaranty to pay them on demand all sums owing by the company not exceeding £6,100 and interest from time of default by the company. In 1898 one of the defendants became insane, and of this the plaintiffs had notice in 1899. The Company continued to bank with the plaintiff until 1907 when the plaintiff became amalgamated with another bank, selling to the new bank all its debts and the benefits of all securities, and guarantees, the company's account was transferred to the new bank and the company paid interest to the new bank. In 1912 the plaintiffs demanded payment from the company of the amounts owing, and then commenced an action to enforce the debentures in which they realised part of the amount due to them; and in 1915 the present action was commenced against the defendant as committee of the lunatic guarantor for the balance due from the company after deducting the amount realised on the debentures. Lawrence, J., who tried the action, held that so far as the lunatic guarantor was concerned his guaranty ceased as a continuing guaranty in 1899 when the plaintiffs had notice of his lunacy, though his liability for the amount then due continued; that the amount then due on current account had been satisfied by subsequent payments; but that the defendant was liable for the amount due on the loan account. The defendant appealed and the Court of Appeal (Pickford, Bankes, and Scrutton, L.JJ.) held (1) that the loan account and current account could not be treated as one account, and therefore that subsequent payments into the current account could not properly be applied as satisfying the loan account; (2) that the plaintiffs' claim was not barred by the statute, because no cause of action arose until demand had been made by the plaintiffs and no demand was made until 1912; (3) that the transactions arising out of the amalgamation of the plaintiffs with

the new bank and the dealing with the accounts of the company consequent thereon even if they could be said to amount to a novation did not discharge the surety and therefore (4) that the defendant was liable for the amount due in respect of the loan, and the appeal was therefore dismissed.

The report states that the action was brought against the committee of the lunatic, but from the discussion which took place as to costs it would appear that the lunatic himself was also a party because the Court gave costs against the lunatic but refused to make a personal order against his committee.

CRIMINAL LAW—CHARGE OF GROSS INDECENCY WITH BOY—EVIDENCE OF POSSESSION OF INDECENT PHOTOGRAPHS OF BOYS—ADMISSIBILITY—JURY PENDING ADJOURNMENT CONVERSING WITH WITNESS—MATERIALITY.

The King v. *Twiss* (1918) 2 K.B. 853. This was a prosecution for committing acts of gross indecency with a boy. At the trial the Crown tendered evidence of the possession by prisoner of a number of indecent photographs of boys. Pending an adjournment of the trial two of the jurors had conversed with witnesses for the prosecution. On the matter being drawn to the attention of Coleridge, J., the presiding Judge, he called on the jurors for an explanation, and on their statements he was satisfied that the accused had been in no way prejudiced. The prisoner was convicted, and he appealed to a Divisional Court (Avory and Lush, JJ.) on the ground of the improper reception of evidence and the jurors having conversed with witnesses, relying on the latter ground on the case of *Rex* v. *Ketheridge* (1915), 1 K.B. 467 (noted *ante* vol. 51, p. 246). The Divisional Court, however, held that the evidence objected to was admissible on the principle that the possession of burglars' tools by a person accused of burglary is admissible; and they distinguished the *Kekeridge* case because there the action complained of had taken place after the trial had closed and the Judge had charged the jury, whereas in the present case the irregularity had taken place pending the trial and as the Judge had found had in nowise prejudiced the prisoner.

SHIP—SHIP REQUISITIONED BY ADMIRALTY—CHARTERPARTY—ABSENCE OF LIGHTS IN PURSUANCE OF ADMIRALTY INSTRUCTIONS — COLLISION — "CONSEQUENCE OF WARLIKE OPERATIONS"—"CAUSE ARISING AS A SEA RISK."

British and Foreign S.S. Co. v. *The King* (1918) 2 K.B. 879. This was an appeal from the decision of Rowlatt, J. (1917) 2 K.B.

769 (noted *ante* vol. 54, p. 108). The plaintiffs, in a petition of right, claimed to recover for the loss of a ship requisitioned by the Admiralty. The requisition was subject to the terms of a charter-party whereby it was provided that the Admiralty should not be held liable if the vessel be lost in consequence of any cause arising as a sea risk, but the Admiralty took the risk of "all consequences of hostilities or warlike operations." The vessel was engaged in evacuating troops from the Gallipoli; by instructions of the Admiralty, she was forbidden to shew any lights. In consequence of the absence of lights a collision with a French battleship took place, and the vessel was lost. Rowlatt, J., in these circumstances, held that the Admiralty was liable, and the Court of Appeal (Eady, M.R., and Scrutton, and Duke, L.JJ.) agreed with his decision.

JUDICIAL DISCRETION— MODE IN WHICH JUDICIAL DISCRETION IS TO BE EXERCISED.

Hines v. *Hines* (1918) P. 364. Although a divorce case deserves attention for the fact that therein is discussed the way in which a judicial discretion ought to be exercised. The application was to grant a decree absolute for divorce notwithstanding the petitioner had himself committed adultery. Although, under the Divorce Act, the judge has an absolute discretion yet McCardie, J., held that discretion must not be exercised capriciously or in accordance with the private views of the Judge, but subject to the authorities and considerations of public morality therein laid down and in the exercise of such discretion he refused the application.

COMPANY—DEBENTURES—TRUST DEED—SHARES IN ANOTHER COMPANY TRANSFERRED TO TRUSTEE—RIGHT OF TRUSTEE TO VOTE ON SHARES HELD AS TRUSTEE FOR DEBENTURE HOLDERS —INTERLOCUTORY APPLICATION.

Siemens v. *Burns* (1918) 2 Ch. 324. This was an appeal from Ashbury, J. The questions involved concerned the rights of trustees for debenture holders as against the company issuing the debentures. In this case certain shares in another company had been transferred to trustees for debenture holders. The debentures were not in default and the trustees claimed to vote as shareholders in respect of the shares so transferred; the company, on the other hand, claimed the right to say how they should vote; but Astbury, J., held that the trustees had the right to vote as they saw fit, and in the exercise of that right were not subject to the direction or control of the transferor company, and the Court of Appeal (Eady, M.R., and Scrutton, and Duke, L.JJ.) affirmed

his decision on this point. Astbury, J., had also, on an interlocutory application of the trustees, Burns, & Hogg, ordered the company to transfer half the shares standing in their names into the joint names of Burns & Hambro. The Court of Appeal, however, considered that such an order could not be properly made on an interlocutory application and it was therefore rescinded.

CHARITY—CHARITABLE PURPOSES—BEQUEST FOR MASSES FOR SOUL OF TESTATOR—SUPERSTITIOUS USES—1 EDW. VI. C. 14.

In re Egan Keane v. *Hoare* (1918) 2 Ch. 350. A pecuniary bequest for masses for the repose of the soul of the testator was held by the Court of Appeal (Eady, M.R., and Warrington, and Duke, L.JJ.) affirming the decision of Eve, J., to be null and void as a superstitious use within the meaning of the statute, 1 Edw. VI. c. 14. In this Province such a bequest is held to be valid: *Elmsley* v. *Madden*, 18 Gr. 386; *Re Zeagman*, 37 O.L.R. 536, as the act of Edw. VI. is considered not to be in force in Ontario.

REVENUE—ESTATE DUTY—SETTLED LEGACY—DEATH OF TENANT FOR LIFE WITHIN TWELVE MONTHS FROM TESTATOR'S DEATH (SUCCESSION DUTY ACT, R.S.O. C. 24, S. 13).

In re Harrison Johnstone v. *Blackburn* (1918) 2 Ch. 374. In this case the simple question was whether or not the interest of a tenant for life in a settled legacy was liable to estate duty, he having died within twelve months after the testator's death, and therefore never having had any enjoyment of the legacy. Sargant, J., held that the interest of the life tenant was in such circumstances not dutiable: (See R.S.O. c. 24, s. 13).

COMPANY—DEBENTURE HOLDERS' ACTION—WINDING-UP—CONTRIBUTORS TO NEWSPAPER—"CLERK OR SERVANT"—PREFERENTIAL CLAIM—COMPANIES CONSOLIDATION ACT, 1908 (8 EDW. VII C. 69), SS. 107, 109—(R.S.C. C. 144, S. 70; R.S.O. C. 178, S. 98).

In re Ashley Ashley v. *The Company* (1918) 2 Ch. 378. In this action, which was brought to enforce the securities of holders of debentures of a newspaper company, an inquiry was directed to inquire as to creditors entitled to preferential payment, and claims were preferred by two persons who had acted as paid correspondents of the company in different localities for the purpose of gathering and supplying sporting news from time to time. They performed the work as they pleased and did not work under

the control of the company. These persons were paid certain specific sums for their services, but were not treated or regarded as permanent employees of the company and were at liberty to terminate their engagements with the company at any time without notice; and it was held by Sargant, J., that neither of them came within the category of "clerk or servant" within the meaning of the Companies Consolidation Act, 1908 (8 Edw. VII. c. 69), ss. 107, 209 (and see R.S.C. c. 144, s. 70; R.S.O. c. 178, s. 98).

POWER OF APPOINTMENT BY WILL—MARRIAGE SETTLEMENT—ENGLISH WIFE—FRENCH HUSBAND—CONSTRUCTION OF SETTLEMENT ACCORDING TO ENGLISH LAW—FRENCH DOMICIL—UNATTESTED FRENCH HOLOGRAPH WILL—VALID EXERCISE OF POWER—EXTENT OF PROPERTY APPOINTED—FRENCH LAW—WILLS ACT 1837 (1 Vict. c. 26), s. 27—(R.S.O. c. 120, ss. 11, 13, 30).

In re Lewal Gould v. *Lewal* (1918) 2 Ch. 391. The question in this case was whether, and to what extent, a testamentary power had been well executed. The power was contained in the marriage settlement of an English lady married to a Frenchman domiciled in France. By the terms of the settlement it was to be construed according to English law. The lady was a minor and of the age of 19 at the time of the making of the will, which was an unattested holograph will made in France, whereby she appointed her husband her "legataire universel." The will was a valid will according to the law of France to the extent of one-half of the property of the testatrix, as she was under 21. Peterson, J., held that the provision requiring the settlement to be construed according to English law did not have the effect of restricting the testamentary capacity of the wife to full age according to the law of England and that the will, being a valid will according to the law of France, was within the contemplation of the settlement as an instrument by which the power could be exercised, and that s. 27 of the Wills Act, 1837 (see R.S.O. c. 120, s. 30) could be invoked for the purpose of interpreting the French will and that the power had, under that section, been effectually exercised, but as the will was only valid according to the French law to the extent of one-half to the testatrix's property it only operated on one-half of the property subject to the power, and as to the other half it went as in default of appointment.

MORTGAGE—CHARGE TO SECURE FURTHER ADVANCES—COLLATERAL SECURITIES DEPOSITED BY MORTGAGEES WITH MORTGAGORS TO SECURE LOAN TO MORTGAGOR—SALE BY BANK—PROCEEDS APPLIED ON LOAN ACCOUNT.

In re Smith Lawrence v. *Kitson* (1918) 2 Ch. 405. By memoranda of charge a testator had charged in favour of his two sisters an estate in Dominica to secure certain stated sums, and such further sums as they or either of them should advance to him. Subsequently the two sisters from time to time deposited with the testator's bank by way of collateral securities for the testator's loan account with the bank. These securities the bank ultimately realised and applied the proceeds towards payment of the loan. In the administration of the testator's estate, the sisters claimed that the amount realised by the bank from the securities so deposited by them were further advances, and as such secured by the charge above referred to; and Peterson, J., upheld that claim.

Correspondence.

CANADIAN BAR ASSOCIATION.

To the Editor, CANADA LAW JOURNAL.

Dear Sir:—I have read with a great deal of interest your editorial on the Canadian Bar Association and the Administration of Justice in the last issue of the *Journal*. So far as I can see, every one of the commendations set out should receive the unqualified support of every practitioner in Canada. The Canadian Bar Association has justified its existence, did it do nothing further than express in concrete form the opinions that individual practitioners have possessed on these propositions for many years. These commendations can only be effective and the subject of action if they are followed up and the duty rests upon the whole Bar to become active in that connection. Insofar as the Canadian Bar Association is concerned, would it not be possible, by the different bodies of Benchers co-operating, for every practitioner in Canada to be a member of the Association; say, by constituting the Association through the different provincial bodies so that each member of good standing in each Province would be a member of the Canadian Bar Association, the fees of such individual members to be paid by the Benchers of the Province to which they belonged.

The amount of such fees to carry on the work of the Bar Association would be very small indeed, and, in fact, might not result in any increase in the yearly fees paid provincially. With such an organization the Bar Association could become a power that need not merely commend such matters as that referred to in your editorial but could demand these reforms to be brought about and would be in a position to enforce such a demand. There is no reason why the standing of the Canadian Bar should not be as high as that of the English Bar in ethics and in its standard of proficiency. No effort should be withheld that would tend towards that end and the Canadian Bar Association could do most effective work in that direction. It could also correct the anomalies that exist and be of most material aid to legislation that will be for the benefit of the whole Dominion. If these views meet with your own, perhaps through the medium of your journal you could bring them to the attention of the members of the profession.

Yours,

W. H. D. LADNER.

[We are glad to publish the above communication. It is of interest to the profession and contains food for thought which may in due time develop into beneficial action. All organizations such as the Canadian Bar Association require time for development and to secure the confidence and support of the profession. The suggestion made by our correspondent was also made some time ago by some members of the Manitoba Bar, and we believe also in Saskatchewan. Their suggestion was that there should be in each of the Provinces a small sum added to the annual fees of members of the Provincial Law Societies which would automatically make them members of the Canadian Bar Association. We should be glad to hear from any of our readers on this subject. EDITOR, C.L.J.]

RE THE ONTARIO TEMPERANCE ACT.

To The Editor, CANADA LAW JOURNAL:

Sir:—I wish to call your attention to the tyrannical and un-British character of the so-called Ontario Temperance Act. If you read the same you will be struck with many of its provisions, which are utterly at variance with all principles of British law and liberty. At present, I will call your attention to subsection (3) of section 55 which provides in short, as per marginal note, that a person found intoxicated is compellable to disclose name of persons

from whom liquor was obtained. The penalty for non-disclosure is imprisonment for an indefinite length of time. Section 79: A witness refusing to answer a question may be committed by the presiding Justice or Justices to the common jail of the county or to a lock-up there to remain until he consents to answer. That may be imprisonment for life, nothing less. Section 83: The effect of this section is that it is not necessary to prove that an offence has been committed but the Magistrate or Justice or Justices of the Peace may make a conviction if he or they think that the defendant is guilty; no actual proof is necessary. Under such laws no man is sure of his liberty or freedom. He is charged with an offence under the Act and no proof is necessary to convict him. The much and justly abused Spanish Inquisition was no worse than the O.T.A. How long are Britishers, if there are any in Ontario, going to put up with such laws? Kindly insert this in the JOURNAL and perform a kind action for the Goddess of Liberty, who appears at present to be suffering from Spanish "Flu."

Yours in L. B. & C.,

Jan. 4, 1919. LEX.

[The cruel treatment which might result from the enactments above referred to is unlikely. Our temperance friends would probably say that those provisions are intended to operate *in terrorem;* but, as such, and also being inquisitorial are objectionable.

It has often been said, and we fear with some truth, that Temperance advocates too often mar their good work by intemperance in words and acts.]

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Man.] [Dec. 9, 1918.

NORTH AMERICAN ACCIDENT INSURANCE CO. v. NEWTON.

Accident insurance—Employer's indemnity—Assignment by insured —Right of assignment against insurer—Payment of claim—Money advanced by outside party—Measure of damages.

By an Employer's Liability Policy, N. was insured against loss from liability an account of bodily injuries to, or death of, an employee. N. incurred such liability but made an assignment for benefit of his creditors before he paid his employee's claim. With money advanced by a third party the assignee paid it and brought action against the insurer to be reimbursed.

Held, that the Insurance Company was liable; that the right of N. to pay his employee and collect the amount from the Insurance Company passed to his assignee; that payment to the employee before the assignment was not essential; that the insurer could not inquire into the source from which the money came to make the payment; and that the insurer's liability was not limited to the amount which the insolvent estate realized to pay the creditors.

Appeal dismissed with costs.

Chrysler, K.C., for appellant. *E. K. Williams*, for respondent.

Ont.] [Dec. 12, 1918.

DINGLE v. WORLD NEWSPAPER CO.

Pleading—Libel—Action against newspayer company—Advantage of want of notice—Averment in plea—Denial—R.S.O. [1914] c. 71, s. 8 (1) and 15 (15).

By sec., 15 subsec. 1 of the Libel and Slander Act (R.S.O. [1914] ch. 71) the defendant in an action against a newspaper company is not entitled to take advantage of the want of notice required by sec. 8 unless the name of the proprietor and publisher is stated at a specified place in the paper. In a case in which there was no proof that the name was so stated:—

Held, reversing the judgment of the Appellate Division (43 Ont. L.R. 218) that the failure of the plaintiff to allege non-compliance with the requirements of sec. 15 (1) in his reply to a plea

setting up want of notice is not an admission of the fact of such compliance.

Held also, that under the practice in Ontario, even if the defendant by his plea alleges such compliance, the same is not admitted by the absence of denial in the application.

Appeal allowed with costs.

D. J. Coffey, for appellant; *Kenneth Mackenzie*, for respondents.

Bench and Bar

JUDICIAL CHANGES IN ENGLAND.

These changes have been of frequent occurrence during the last few years, and it is difficult to keep track of the personnel of the English judiciary. Lord Findlay, who not very long ago was promoted to the eminent position of Lord High Chancellor of England, has resigned. He was a man highly thought of by his brethren in England as a sound lawyer of wide experience and learning and personally popular. He was well known to the profession in the overseas Dominions and was retained in numberless appeals to the Privy Council. He is succeeded by Sir F. E. Smith, the Attorney-General, who, as such, has a traditional right to the reversion to the Wool-sack. We had the pleasure on a recent occasion of seeing and hearing the new Chancellor in this country. We congratulate him on his promotion.

Sir George Howat, who was Solicitor-General, now becomes Attorney-General, and in his turn is succeeded by Sir Ernest Pollock. Both these new Law Officers of the Crown have done excellent work for their country during the late war.

The vacancy in the Chancery Division, caused by the death of Mr. Justice Neville, has been filled by the appointment of Mr. R. O. Lawrence, K.C.

The appointment of Sir George Cave to the office of a Lord of Appeal, rendered vacant by the death of Lord Parker, meets with the approval of the profession. He had a large practice as a junior, which was well maintained after he took silk in 1904. It will be remembered that he was for a short time Solicitor-General, and subsequently Home Secretary, in which positions he is said to have given good service.

Flotsam and Jetsam.

THE PUNISHMENT OF ATROCIOUS GERMAN CRIMINALS.

The British Government with commendable promptitude appointed a Board of Commissioners to act with the Law Officers of the Crown, and in liaison with our Allies to inquire and report upon the individuals who have been guilty of atrocities during the past four years, with the purpose of making them personally responsible for such acts. The names are as follows:—

Chairman:—Sir John Macdonell, K.C., C.B.

Vice-Chairman:—Professor J. H. Morgan.

Members:—Sir Frederick Pollock, Bt., Sir Ernest Pollock, K.C., M.P., Sir Alfred Hopkinson, K.C., Sir John Butcher, K.C. M.P., Mr. C. F. McGill, K.C., Mr. H. F. Manisty, K.C., Mr. C. A. Russell, K.C., and Dr. A. Pearce Higgins, together with representatives from the War Office, the Foreign Office and the Admiralty. Their duty will be to report (1) As to the breaches of the law, and customs of the war, committed by the forces of the German Empire and their allies. (2) The degree of responsibility for these offences attaching to particular members of the German or other enemy forces, including members of the general staff, or other highly placed individuals. (3) The construction and procedure of a tribunal appropriate to the trial of these offences. (4) Any other matters cognate or ancillary to the above, which may arise in the course of inquiry.

The whole position was summed up by the Lord Chancellor at the Guildhall banquet, in the following words:—"We are face to face with the fact that the forces of our enemy have collapsed, and the duty now rests on us of seeing that international right is restored, and that the outrages that have been committed upon it are stamped with the disapproval which can only be adequately expressed by the punishment of those responsible."

Since the above was written it is announced that a large volume of evidence has been collected and a preliminary report is being prepared. This is engaging it is said the personal attention of the Attorney General of England. It is also stated that among the numerous criminals who are to be indicted are those of the Ex-Kaiser, Fritz, Turpitz, Generals Stein, Boehm, etc. The Belgians and French have their own lists as well.

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THE FREEDOM OF THE SEAS.

Much has been said regarding this proposition of President Wilson concerning the freedom of the seas.

It has been feared by some that the principle the President seeks to establish is calculated to paralyze the action of Great Britain in time of war, and as it were tie up its principal arm of defence behind its back. Carried out in the terms laid down by the President it would undoubtedly have the effect of preventing Great Britain from being its own judge as to the course it should see fit to pursue in the event of its finding itself involved in war, and would compel it to seek from some international authority to be established the right to do that which she might conceive essential for her protection from her enemies. How, it may be asked, is that international authority to be obtained?

It is generally conceded that in times of peace the seas are free to all nations, and it is only in time of war that it becomes necessary for any nation to restrict this freedom. President Wilson's thesis is that this restriction shall be the result of international agreement and not the result of the mere arbitrary will of any belligerent. His proposition is this, "Absolute freedom of navigation upon the seas outside the territorial waters, alike in peace and in war. Except as the seas may be closed in whole or in part by international action for the enforcement of international covenants."

It is this exception that involves the crux of the whole matter. By "international covenants" it may possibly be assumed that he means "international obligations" wherein would be included the obligation of all nations to submit to the judgment of the international authority to be established for the settlement of all international disputes.

If a nation refused to submit itself to the international judgment and should resort to war, then if those whom it attacked should automatically by international authority have the right to close the seas in any way they should see fit, and be able to accomplish, in order to frustrate the efforts of the recalcitrant nation and to compel it to abide by its international obligation, there could not be much objection by any law-abiding nation.

If this be the meaning of the exception, it might not in any way interfere with any nation's right adequately to protect itself in time of war provided that in engaging in war it was not itself acting contrary to the judgment of the international authority.

But, if it should mean that when war has been entered upon by one nation, in disregard of the judgment of the international authority, the freedom of the seas may not be restricted by any belligerent without the concurrence of the international authority first specifically had and obtained, that might occasion a delay which might prove fatal to the just necessities of the law-abiding belligerent and be a source of comfort and assistance to his opponent; because in time of war it is absolutely necessary that measures of defence, as well as measures of attack, shall be taken with the utmost despatch.

Thus, in the case put, if the exception means what has been suggested, the nation wrongfully refusing to abide by the international judgment would be precluded from interfering with the freedom of the seas, whereas those whom it attacked would have a perfect right to do so, with the result that at the conclusion of the war any injury occasioned to other nations by the restriction of the freedom of the seas, whether by the recalcitrant nation, or by its opponent, would be the subject of a claim for compensation against the recalcitrant nation.

For the sake of avoiding all misunderstanding as to the meaning of the exception, it should be made clear that the international action therein referred to is to be an automatic action, and not the result of conferences and debates and negotiations after the emergency has distinctly arisen.

We can never forget that although Britannia has for many a century past "ruled the waves," she has never yet ruled them,

in times of peace, to the injury of the just rights of any other nation however politically insignificant. On the contrary, she has for the benefit of humanity at large effectually put down piracy and slave-trading. It is only in time of war that friction has ever arisen on the subject; and even then she has acted only when compelled by the law of self preservation to resort to measures which resulted in a restriction of the freedom of others. She has done so in the war which has just come to an end. Neutral nations have been restricted in the use of the seas for the purpose of carrying on trade with the enemies not of only Great Britain, but of humanity; and by these measures she has once again been enabled to deliver Europe and the world from what aimed to be a worldrwide tyranny. In doing what she did in this respect, Great Britain acted it is true on her own initiative; she had to. She determined for herself what was best to be done to meet the common danger, and she did it effectually, as the event has proved. All that remains for the contemplated league of nations to do is to give its personal sanction to Great Britain doing again, in a like emergency, the same thing. To seek to restrict her action otherwise would be to endanger not only her own existence, but that of the league of nations itself. When the wolf is at the door it is a bad time to argue who shall close it.

PUBLIC POLICY.

Decisions founded on what is called "public policy" are of all decisions the least satisfactory as expositions of the law, and the most unreliable. What the Courts to-day may be pleased to say is "public policy," the Courts a few years hence may declare has ceased to be "public policy," and that something else and wholly different has taken its place. It is about as bad as that kind of "equity," which was said to depend on the length of the Chancellor's foot. Public policy, after all is said, appears to be that particular view which the Judges for the time being come to the conclusion is best in the supposed interests of the public; and it is very easy to see how wide a difference of opinion the question what is to-day "public policy" naturally invites:—

In a recent case in the House of Lords, *Rodriguez* v. *Speyer*, 119 L.T. 409, Lord Haldane took occasion to make some observations on the subject of decisions resting on "public policy" which serve to shew how treacherous a ground it is—very like indeed what might be called a "legal quick-sand." He says, for instance, 'what the law recognizes as contrary to public policy turns out to vary greatly from time to time". Further, he remarks: "I think there are many things of which the Judges are bound to take judicial notice which lie outside the law properly so called, and among those things are what is called public policy and *the changes which take place in it.* The law itself may become modified by this obligation of the Judges." Furthermore, he quotes an observation of that very eminent lawyer, the late Lord Watson, when he said: "A series of decisions based on the grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal," and Lord Haldane remarks, "In England it is beyond the jurisdiction of her tribunals to mould and stereotype national policy"—by which it is presumed he means to include "public policy"—"their function, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time."

We may remark it is not for a moment pretended that this "rule of policy" is to be sought in any law, statutory or otherwise, but it is apparently solely to be derived from the inner consciousness of the Judges themselves as to what, in their opinion, for the time being, is the "policy" most beneficial for the public interests, and most in accordance with the general contemporary notions of liberty and justice.

So it comes to pass that what was yesterday declared to be "law" is in a later day declared to be mere "rhetoric."

OUR BROTHERS WHO FELL.

There is a movement on foot in England to provide some suitable memorial for those members of the profession who fell during the late war in defence of their country. There should be, and doubtless will be, something of a similar character in this country. Those to whom this duty appertains in this regard will not forget the desire of the profession in this matter as soon as the time comes when action can satisfactorily be taken. In the meantime, suggestions would be in order as to the form this memorial should take; and we should be glad to hear from our readers on the subject. We venture to assert that the legal profession in Canada has, in proportion to its numbers, suffered greater losses in life and limb than any other class. It will take some time to gather all the information that is necessary for a suitable memorial; but we understand that in the various provinces this is being attended to. Whilst we mourn for those of our brothers who have so freely given their lives in such noble service, we welcome back to their homes those who are now returning.

INTERNED ALIENS.

We submit for the consideration of those in authority the very sane views of the Editor of *Law Notes* on this subject. They are thus expressed (in part) in a recent number of that excellent journal as follows:—

"It is related that during the Civil War some Federal soldiers on duty in a 'copperhead' district found a rattlesnake and were about to despatch him. At this juncture there came along an officer fuming inwardly over having been compelled to release some 'Knights of the Golden Circle' on their taking the oath of allegiance. 'Here,' he said, 'don't kill that snake. Swear him and let him go.' It is with similar feelings that the average American contemplates the possible release of the interned enemy aliens at the close of the war, . . Poetic justice is but rarely possible in a prosaic world, but in this instance nothing could be more just than that those who have preferred the land of their

birth to that of their adoption, who have sympathized with its unholy ambitions and gloried in its crimes, should be sent back to that land. They made their choice; let them abide by it. They have no part or parcel in the victorious peace which the blood of heroes has bought for us."

ALIENS IN CANADA.

That "great American," as the *Law Notes* describes Theodore Roosevelt, in his last known words in speaking of alien immigrants says they should be welcomed if they in good faith desire to become Americans, and to assimilate themselves in that regard. "But," he adds, "this is predicated upon the man's becoming in very fact an American and nothing but an American. If he tries to keep segregated with men of his own origin and separated from the rest of America, then he isn't doing his part as an American. There can be no divided allegiance here. Any man who says he is an American, but something else also, isn't an American at all. We have room for but one flag, the American flag, and this excludes the red flag, which symbolizes all wars against liberty and civilization, just as much as it excludes any foreign flag of a nation to which we are hostile. We have room for but one language here, and that is the English language, for we intend to see that the crucible turns our people out as Americans, of American nationality and not as dwellers in a polyglot boarding house; and we have room for but one soul loyalty, and that is loyalty to the American people."

The above sentiments are as applicable to Canada and the British Empire as they are to the United States, and we adopt them as expressing our views on the subject.

*DATES AND SIGNATURES.**

As an abstract proposition, a verbal agreement is as binding as any other; but, on account of the matter of proof thereof, some sort of writing, dated and signed by the parties, is generally substituted for the word-of-mouth understanding, thus providing a more permanent—and a supposedly more reliable—way of evidencing the agreement of the parties, as well as of identifying them and it. The importance of preserving such ready proof has led to numerous statutes requiring various transactions to be so evidenced in order to be effective.

Thus we are brought to an age when practically all agreements, etc., are reduced to writing; but the writer, years ago, in an article published in *The Lawyer and Banker*, San Francisco, warned against the dangers of relying too strongly on written—as distinquished from verbal—evidence; he said (*inter alia*), "With the now universal use of writings as a means of proof in litigation, there has come amongst us even a greater temptation to introduce false documents, than there was heretofore to swear falsely."

Indeed, it is not always that the Courts will even hold that a paper setting forth the terms of a transaction is a *written* document, and the matters of date and signature are still more uncertain.

What are "Written" Documents.—One would suppose, wherever the provisions of a transaction were set forth in *any* descriptive or symbolic form understood by the parties, upon a permanent receiving surface, that this would (for the purposes of the transaction) be considered as a writing thereof; that is, in fact, the generally accepted view, so that it would be immaterial how such presentation was actually made. Yet, where a statute required a holographic will to be *written* by the testator himself, one who himself *typewrote* the body of his own will and then signed it in the ordinary way, did not thereby comply with the same.

In Pennsylvania the Legislature has enacted that (except as to signatures) typewriting shall be considered as writing, yet even

*This article is copied from the *Central Law Journal*, St. Louis, U.S.A., vol. 87, p. 238. The authorities referred to by the writer will be fovnd by reference thereto.—Ed. C.L.J.

in that State typewritten corporate minutes not actually signed by the secretary, but only stamped with his name, are not, *per se* admissible in evidence as such. While the distinction between ink and pencil writing is gone in Pennsylvania, yet this does not apply to routine business of the Courts, whose records must be written in ink, or typewritten or printed, in order to be accepted as such. And where a statute requires the notes of testimony to be certified in *writing* by the court stenographer, a certificate in *shorthand* characters was held not to be "written" within the meaning of the Act.

The document may have been prepared by different instrumentalities, resulting in conflicting provisions; in such cases that which has been inserted by the *more personal* means, overcomes that made in the less personal manner, the former alone being held to be "written"—for the purposes of the case. Thus, handwritten provisions in a printed form and inconsistent therewith, will prevail over the printed words; so, also, if the printed form were filled up on a typewriter whereby an inconsistency appeared, the print would give way to the typewritten words; and where a printed form was consistently filled up on a typewriter, and then a provision at variance with the typewriting was added with pen and ink, the typewriting was considered the same as printing, and the handwriting prevailed.

Assuming then, that we hold that which will pass muster as being "written," we may need to rely upon it as evidence. If it *purports* to be more than 30 years old when offered in evidence, and if it appears to be an old document and free from alterations and other suspicious conditions, it is admissible as an ancient document without proof of execution. If not so admissible, then we must be prepared to prove the signatures, if any, thereto.

Signatures.—When it comes to *signatures*, the prevalent idea, that here at last, we have something definitely, fixedly, and personally, a part of the individuality of the purported signer, is legally wrong. True, we generally find such a condition, and sometimes it is required by statute; but wherever possible the Courts hold that such is not necessarily the case, and that whatever the form of symbol, and however, and by whomsoever, made, *if*

it be so intended by the party thereby represented, it will operate as the "signature" of such party. This rule may have originated in necessity, but even so, it now often inflicts serious hardships; unscrupulous individuals frequently procure othe persons to sign their names to papers or obligations not requiring to be witnessed; when settlement day arrives, they promptly repudiate the procured signatures and evade the liability, except in the few cases where the other party is able to shew the adoption of such signature by the obligor.

What is Sufficient as Signatures.—Ordinarily a signature purports to be the *name* of the party; but the mere circumstance that the name is that of a person of a certain sex, is not conclusive of that question.

Where, as in California and Virginia, a holographic will must be written and *signed* by the testator, it will suffice if testator only signs it with his initials. Affixing a colored seal, and writing testator's initials and the word "seal" thereon, if intended as a signature, will be enough. A "mark" signature is sufficient—the actual name being written by another; or the "mark" may be omitted, and the party merely touch the pen used by the other; it will be enough if he *consciously* participates to *any* extent in the act and adopts it. Even a finger print would no doubt be upheld as a signature if necessary.

Errors in Name.—Where the identity of the testatrix is not questioned, her will is sufficiently signed by her when the subscription appears as "Nancy Wilson her (X) mark *Whaley*," even although her correct name was Nancy Wilson *Hendrix*. An error in the spelling of the party's name will not, of itself, prevent it from being sustained as a valid signature of such person. One who sometimes wrote her first name "Lizzie," and at other times "Elizabeth," denied a signature on a judgment note "Elizze," as being erroneous, and there was other evidence pro and con; the Court declined to open the judgment.

So also, where a signature is required by statute to be attested by a subscribing witness, the fact that such witness, in signing, inadvertently wrote a name other than his own, would not vitiate the attestation; and where a will was executed in duplicate, and

one of the copies shewed an error in the signature of a witness, a letter having been first omitted from her last name and then interlined above it, while in the other copy there was no such mistake, it was held that both were valid and both should be probated as the will of testatrix.

Placing of Signature.—The placing of a signature at a particular point with reference to the body of the paper only becomes absolutely essential when made so by statute. Thus, in Pennsylvania, where wills must be signed at the "end" thereof, this means at the end, with regard to the sense of the testamentary provisions of the document when read. In Mississippi, where wills must be signed, but the statute does not say where, the signature is not necessarily required to be at the end of the will. The same rule prevails in New Jersey; but in California, where a holographic will is required by statute to be entirely written and dated and signed by testator himself, and where testator wrote his name at the beginning (but not at the end) of the will, and concluded the document "whereunto I set my hand this (date)," it was held to be for the Court to determine, from an inspection, whether or not this was intended as an execution of the will, and the Court found it was not so intended, and that therefore the will was not "signed."

The common seal of a corporation (being its official "signature") need not be placed next to the signatures of any of the attesting corporate officers.

Names Written by Others.—A party need not necessarily have any physical part at all in the affixing of his signature to a document and yet be bound by it. One who stands by, and either expressly or impliedly consents to another signing his name to a note, and to the delivery of the note to an innocent party for value, is bound thereby.

Even where testator is required by statute to sign his will, there may be a valid will without such signature. Where honest witnesses, not actually acquainted with the testator, attest a signature to a paper purporting to be a will, which purported signature is actually made by someone impersonating the testator, the document will stand as a valid will of such testator, until and unless, the fraud be clearly established. And where a will bears a

properly executed attestation clause it has been held that, in the absence of proof of some reason for testator not signing the will, there is no presumption that no such reason exists, which will overcome the attestation clause, and such clause will shew that nevertheless testator must have *acknowledged, as his own signature*, one made either by himself or someone else.

So also, one who holds a proper power of attorney may execute a paper binding on his principal, by signing same only with the principal's name.

Manner of Signing.—In the absence of statutory requirements, signatures need not be done by actual handwriting, or with pen and ink. In Pennsylvania, the distinction between pen and ink and lead pencil writing, outside of Court records and the like, is gone; elsewhere it has been held that signatures may be made with a pencil. A finger print impression would no doubt do, and a rubber stamp signature to a check is valid; so is a similar endorsement, though the Negotiable Instruments Law speaks of "written" endorsements; yet, where typewritten corporate minutes are not actually signed by the secretary, but only rubber stamped with his name, they will not be admissible in evidence without proof of the authenticity of the use of such stamp.

Letters bearing typewritten signatures are admissible in evidence; but a magistrate's typewritten signature to a jurat of a constable's return to a summons, will not sustain a judgment against a defendant who did not appear, "because it cannot be identified and is too liable to be erased"! A sheriff may use a fac-simile stamp signature as his official signature, in making returns, and a city solicitor may use a printed name to municipal liens, if he intends it as a signature for the purpose; a printed signature is also sufficient evidence of a contract of sale, under the Statute of Frauds.

From the foregoing it would seem that the popular conception of the legal individuality of a signature is shot pretty full of holes, and that in very truth there is, legally, very little left in a mere name—except a strong probability of lawsuits in every event. It is indeed fortunate that, scientifically, the *characteristics of identity of mark* still are left, ready for use in sorting out the goats

from the sheep—in protecting the innocent from the wrongdoers so ready to avail themselves of the doors of broad judicial construction, left wide open for them to pass through.

Dating.—The other element of written documents that has largely degenerated from a condition to a mere theory, is the *dating* thereof.

The time of a transaction is of supreme importance, and for the sake of convenience, as well as to have a ready record thereof, the date is generally set forth in written documents of every kind. The stated date is of course supposed to represent the true date, but as it is quite often a merely arbitrary statement of the time, it is well to consider its real status.

There is—apart from statute—no necessity for any date to be named, as it can be proven *aliunde, if you have the evidence to do so;* and if it be actually set forth in the document, the parties are not bound thereby, but may shew by other evidence that it is, or is not, the correct date. Such evidence is not construed as tending to vary the terms of a written contract and hence is admissible, by way of explanation or ascertainment of the true date.

Of course the *primâ facie* presumption is that a paper is executed on the date it bears; but the presumption that a note was executed and delivered on its date exists only in the absence of evidence to the contrary. On the other hand, the mere dating on a note is no evidence of the maker's presence at such time and place nor is the mere dating of a forged instrument sufficient evidence of venue to give the Court of the district named jurisdiction of a charge of forgery of such document. Neither ante-dating, nor post-dating is, *per se* fatal to a paper, but (when shewn) may become potent evidence of fraud thereby sought to be carried out.

Sunday Dates.—The mere fact that an executory paper is made or dated on Sunday will put the taker on inquiry, but will not invalidate it, if it be delivered or executed on a secular day; where dated on a Sunday it is only presumed to have been also delivered then, in the absence of proof to the contrary. A document that is legally void by reason of its execution and delivery on a Sunday, of course, cannot be the subject of forgery.

Alteration, etc.—Where the date of a document has been changed, that will not, of itself, vitiate the paper, but it will be treated as of its original date, if that can be shewn. This is true, even where there is nothing in the present appearance of a note to indicate that there had been an alteration in the date, if such alteration be in fact established by evidence. And where different parts of a paper are written at different times, this will not constitute evidence of alteration, unless there be testimony to shew that some part was written after the signatures were appended by way of executing the document. Furthermore, where several persons join in making a note for the benefit of one of themselves to whom they intrust it with the date specified as "July —," and where such beneficiary does not use the note till Sept. 1st, to which date he then changes the original date, such change is not a technical alteration, he having implied authority to make it.

Mis-dating.—Where a note in suit was dated January 4, 1904, and plaintiff claimed it should have been 1905, instead of 1904, the mistake being made because the writer was not yet accustomed to writing the new year, and where defendant's pleadings did not raise any issue of intentional alteration, evidence of the mistake was admissible.

Where the statute required a written will to be dated, and the date was set forth in the instrument as the 1st day of June in the year "One thousand," while the evidence shewed the paper to have ben written in the year 1910, it was held invalid; yet, in the same State, where a will was *fully* dated 1859, and contained a gift to one who was not born till 1861, it was admitted to probate, no question being raised, or explanation given, as to the date discrepancy.

Where there was no question as to genuineness, and the alleged error in the date of a will only affected questions of *distribution* thereunder, and the will was dated with the year 1911, and so probated, neither the register of wills, nor the Orphans' Court on appeal from his probate, had power to inquire into its true date, or to receive evidence to shew that it was really executed in 1912; such question could only be gone into on distribution, by the tribunal making the distribution, if it were a matter of any consequence as affecting such distribution.

In another case, a mechanic's lien had been filed against the defendant, under a statute requiring proof of service of notice to be filed of record in Court within 30 days thereafter, failing which the lien would be of no validity. The lien was filed on *July 7th*, and the only entry on the Court records as to the filing of the required proof of notice, was a *rubber stamp* endorsement by the prothonotary on the back of the paper filed, stating that it was filed *Aug. 18th*. Thereafter a rule was taken to strike off the lien, as the record shewed the notice to have been filed too late. Upon an answer being filed, testimony was taken shewing the belief of the prothonotary that the paper was actually filed *July 18th*, the stamped date being a mistake; there was also evidence from a document expert shewing that the movable date on the rubber stamp had accidentally slipped, or been turned, from its correct position, so that the type faces of "July" had gotten just beyond the marking field, and "Aug." had just entered it, thus making the date read "Aug.," which was out of alignment with the rest of the stamped date. Defendant urged that the Court could not contradict its own records by such extraneous evidence, but the appellate Court held that the record should be corrected to shew the true date, and that the rule should be discharged. Of course, if the stamped date had been due to *other than accident or mistake*,—*e.g.*, if done intentionally and knowingly by the prothonotary—the plaintiff would have been bound thereby, and would have been relegated to an action against the official, as his only remedy.

Most of the litigated date questions arise from the *fraudulent* misdating of papers, and while the writer has had legions of such cases in his hands as an examiner of questioned documents, yet comparatively few of them get into the reports on these points, because there is seldom an appeal taken. Many of these unreported cases included notarial certificates to affidavits shewn to have been fraudulently dated and thereupon set aside; others included certificates of acknowledgments that were fraudulently dated, and therefore also put into the discard; still others included fraudulent accounts, and title evidences, in bankruptcy and insurance cases. The following reported cases are representative of the various forms of controversy arising however:

A paper was presented for probate as a will and bore date nearly a year previous to such presentation. The alleged signature of testator thereto was strongly attacked as being a forgery, and the contestant's evidence also shewed that the paper was written and signed long after its date, notwithstanding the subscribing witness testified it was written upon said date. The Orphans' Court, on appeal, directed an issue *dev. vel non.*

In another case, where a party got into financial difficulties, he sought to protect himself by a confession of judgment upon a note under seal in favor of a relative, purporting, by its date, and alleged by the parties thereto, to have been executed and delivered some years before there was any trouble in sight. An expert examination and test of the ink writing of the note disclosed that the assigned date was false, and that the note had been executed at about the time when judgment was entered upon it, and it was dated back in an unsuccessful attempt to defraud the maker's creditors. The note in question waived the benefit of the debtor's exemption, and though the note itself was found to be fraudulent, yet this waiver was held (by reason of the attempted fraud) binding on the maker in favor of the other and legitimate creditors of the defendant.

In an important series of cases there were a number of proceedings in equity to compel a corporation to issue shares of its capital stock to the several plaintiffs, who claimed by reason o- assignments by the holder of what purported to be genuine certifif cates of such stock theretofore issued by the corporation to such holder for large blocks of the stock. The claims were defended on the grounds that some of the certificates so assigned were entire forgeries, and others had been fraudulently raised from a small, to a large, number of shares, and that the alleged assignor of the stock—who was the wrongdoer—had fraudulently misdated the certificates and the corporate records, the better to suit his purposes. At the trials the entire *modus operandi* of the criminal was shewn by the evidence disclosed by an expert examination of the corporate records as kept by the criminal, who was an officer of the company. The plaintiffs, under a threat of judicial compulsion, allowed defendant's expert to test the authenticity of the writing on the

certificates, by microscopic metrie and colorimetric examinations, but declined to permit such writing to be tested chemically to determine their ink constituents, their real ages, and the questions of alterations. Finally the Court compelled plaintiffs to submit the papers for the latter tests, which were then made. The results were that all the cases were decided in favour of the defendant corporation.

The true rule would therefore seem to be, that where the actual execution of the paper is not attacked, or in question, but only its effect, as dependent on the date, the date set forth in the paper will be presumed to be the true date, in the absence of evidence to the contrary, and the truth or falsity of such stated date can be shewn by any lawful evidence, *aliunde* or otherwise, and will not affect the primary fact of execution; if, however, the actual execution of the paper is *denied*, then the question will have to be determined by proof, like any other matter, and this proof can be met by such evidence as in any other case, and the result may be to disprove the execution of the paper by shewing the falsity of the alleged date.

In the latter alternative the paper itself will have no probative force, and the party relying upon it will necessarily be required to establish its execution, by the subscribing witnesses, or by proof of their handwriting, or of the handwriting of the alleged signer; if these witnesses testify that the alleged maker signed the paper on the date it specified, the party relying on the paper will be bound by his proof, even though his witnesses be mistaken, or lie about the date. Consequently, if the other party, by satisfactory evidence, shews that the alleged maker could not have executed the paper on the date claimed, that would set aside the document, even without evidence in denial of the actual execution—though any such evidence would of course strengthen his case.

Judgment was entered on a judgment note dated March 25, 1905, and defendant took a rule to open, on the ground (*inter alia*) of forgery. Plaintiff called one of the two subscribing witnesses, who testified that defendant executed the note on the date named, and at the place set forth as part of such date. This was met by evidence of an alibi for the defendant, covering such

time and place. On appeal the judgment was opened, the higher Court wisely observing that "as there is nothing to shew that the note was signed at any other time than on its date, and as the only evidence of the plaintiffs is that that was the date of its execution, it is difficult to see how one could conclude from the evidence that it was signed at some other time. Of course it was unfortunate for the plaintiff, if his witnesses were not truthful, but (as in every other case) he was bound to prove the execution, and if unable to do so by trustworthy evidence, the execution was not proven, and his case fell.

Such a rule would seem to apply with even more force where a will was in question, because statutes practically always require the execution of wills to be proven by *the evidence of two or more witnesses*, who must separately testify, either to the actual execution thereof by the testator, or to their properly founded belief in such execution; the party who is to pass on such proof—whether it be register, Judge, Court or jury—is without power to accept or to adopt other than such evidence as establishing other than such evidence as establishing the will; one or all may feel perfectly satisfied, from a personal examination of the writing, that the will was signed by the party in question, yet they are powerless to substitute their such belief for the statutory requirements as to proof.

Yet the Supreme Court of Pennsylvania, in a recent remarkable decision, laid the foundation for plenty of future trouble by ignoring the foregoing distinctions. A will purporting to be written and signed by the testator on a date named therein, and attested by two subscribing witnesses, was contested on the ground of forgery. Proponents' statutory proof consisted of the evidence of the subscribing witnesses, to the effect that the testator executed said will in their presence at or about the date, and at the place, mentioned therein; this was corroborated by the usual proof as to handwriting. Contestants met this testimony by conclusive evidence of an alibi for the testator as to both time and place claimed for the execution, and this was corroborated by evidence as to the handwriting not being that of the testator, but that of one of the subscribing witnesses. An issue being awarded, a jury trial

was had and resulted in a verdict in favor of the will. Upon a new trial being granted, a verdict was reached against the will. Proponents stuck to their dates and place of execution every time, and were always met by the alibi. On appeal the Supreme Court held that, even if the jury found that the subscribing witnesses to the alleged will lied, or were mistaken, as to time and place, yet that would not necessarily be fatal; if, notwithstanding, the jury was satisfied *from its own examination of the writing*, that the writing was genuine, the will would nevertheless be valid.

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The Court, in this case, entirely overlooked the fact that, with the formal proof of execution negatived, proponents' *primâ facie* case was gone, and there would be no writing legally before the jury—much less any testimony as to such writing—for the jury to pass upon. How can such a decision be reconciled with the Pennsylvania statute that requires every will to be established by the independent *testimony of two living witnesses* who must give their evidence under oath before the proper tribunal? Nobody, and nothing, else—not even a jury and some writings—can take the place of such witnesses; and when such witnesses are absent, or absolutely discredited, that is logically and properly the end of the matter, just as was held in the other analogous Pennsylvania case before referred to, which states the correct rule.

Soon after the *Husband* case the Supreme Court of Pennsylvania made the broad remark, in the *Baum* case, before referred to, that "the date is not a matter affecting the validity of a will"—which was true, when limited to the facts of that case, because there it only concerned a question of *distribution*, and not one of *execution*, as to which latter point there was no controversy; but as a broad general statement, it was not true, and could only be considered as a dictum.

This *Baum* case, and the *Dubosky* case, represent one side of the line of cleavage in the rule, and were both decided in 1918; the earlier *Varzaly*, *Cassidy*, *Bierly* and *Somerset Telephone* cases are typical of the other side; the *Husband* case, decided in 1917, belonged with the latter class, but seems to have been lost in the shuffle—at any rate it can scarcely be depended upon (with safety) as an authority.

Conclusion.—In the words of the Arabic proverb, "Everything crooked-necked is not a camel;" so before either attacking, or relying upon, a written document, it would be well to remember that:

1. Any name or symbol, made in any manner with any instrument (and sometimes even where not made by the supposed maker at all) may constitute a valid signature.

2. If the execution of a writing be admitted, the falsity of its assigned date will not affect its validity; but if the execution be denied, the false dating will probably be fatal to it.

Express statutory provisions may of course modify these broad and very general rules, which may soon come to have a special significance, in view of the fact that, right after the first heavy loss of American lives in the pending war, a mysterious advertisement for "old portraits" appeared prominently in the daily press—something scarcely worth purchasing except to bolster up some fraudulent scheme.

THE PREVENTION OF WAR.

There is so much good sense in a short article on this subject in the February issue of the *Law Notes* (Northport, New York), that we publish it in full, taking exception, however, to the last sentence:—

"There are some optimists who seem to believe that with the passing of autocracy the danger of war is forever averted; that self-governing peoples will never enter on armed conflict. The idea that peoples are unwillingly hurled into war by autocratic monarchs is the veriest nonsense. Sometimes they enter into an aggressive war willingly, as did the people of Germany, who would doubtless in July, 1914, have voted with practical unanimity for war. Sometimes they are drawn into war by the irresistible logic of events. That was the case in 1861, when no responsible man, north or south, wanted war, and yet war became inevitable because there was an issue which had to be decided and no other method of decision was open. Both sides had the fullest measure of self-government, both sides wanted a peaceful solution, provided only

that it was solved in their way. The prevention of war is not therefore to be found in popular govenment; it is not to be found in any degree of goodwill which can just at the present time be expected. The 'balance of power' will not avert war for the simple reason that it will not remain in stable equilibrium. There is another theory that war can be averted only by substituting class consciousness for national consciousness. Since recent events in Russia, culminating in the arrest of Lenine by Trotzky, that idea has not made very much of an appeal to thinking persons. Every person not afflicted with Teutonism of the mind knows that the moment a 'class consciousness' is established a process of sub-classification will begin and strife will be renewed. The good conduct of nations, like the good conduct of individuals, is to be secured in just one way—by the operation of two elements, one of which is a necessary preliminary to the other, 'the law' and 'the gospel.' Just as the men of belligerent temper can be restrained from settling their differences by personal combat only by the existence of a tribunal to whose decision they are bound to submit, belligerently inclined nations can be kept from war only by an international court whose jurisdiction is not dependent on consent and whose decrees may be enforced. Whether that enforcement lies in a league of nations or in a coalition pledged to keep the peace of the world, the power to decide and the power to enforce the decision are essential if war is to cease. But it is only in a barbaric state that the power of the law is the only restraint against crime and violence. In civilized communities, most people would keep the peace were the Courts closed and the police force disbanded. So with nations, while laws and the power to enforce them must exist, the growth of mutual understanding and mutual good feeling will be the most potent security against war and will in time make other securities superfluous."

The growth of "mutual understanding and mutual good feeling" is most desirable, and we should all work for it; but that it will ever be a "potent security against war," or "will in time make other securities superfluous" we do not believe. The growth spoken of has always been nipped in the bud, and always will be; and for the simple reason that human nature is warped

and vicious; it always has been, and always will be so. It is described by the One who knows it better than anyone else, as "deceitful above all things and desperately wicked. Who can know it?" We all realize that this statement is absolutely true, and the history of the world proves it. It is insane folly to hope that human nature will ever change. The only hope is in a supernatural power to police the world. That will come, but only when the One appears who can and will "rule the nations with a rod of iron."

NOTES FROM THE ENGLISH INNS OF COURT.

Reconstruction in the Temple.

Members of the Bar who have been on active service are beginning to return to their former haunts. When the first scheme of demobilization was framed, the authorities were minded to release men from the army "by trades"—that is to say, the members of the most important trade were to be the first set free. A priority list was prepared. "Ratcatchers" stood at the head, and, strange as it may appear, "attorneys and barristers-at-law" were relegated to the bottom of the list! But that scheme has now been "scrapped," and members of the Bar are being rapidly released from military service.

But to what do these men return? Are clients waiting, with open arms, to receive them and give them lucrative employment? In this connection it is to be remembered that we, in England, are not like you in Canada. Here there is a great gulf fixed between the two branches of the profession. The solicitor who went on active service may have had a partner to keep his connection together; but the barrister had and could have none. He went forth leaving his name on a door in the Temple, and (in some cases) a clerk, who might tell would-be clients that Mr. —— "is at present out of town, and the date of his return is uncertain." Yes, the date of his return was uncertain; and as many of these gallant men may find, there is an uncertainty as to whether they

are returning to anything substantial in the way of a connection. However, those who remained behind have done their best for absent friends; and it may be that the Temple will before long assume that look of prosperity which it had before the war.

Damages for Nervous Shock.

The question whether a person can sustain an action for damages for nervous shock caused, not by actions, but by mere words, was considered in a recent case in the King's Bench (*Janvier* v. *Sweeney*). A Frenchwoman claimed damages from two private inquiry agents for nervous shock, which she said she had suffered because of their conduct. She had been visited by one of them who represented that he came from Scotland Yard, and "wanted" her because she had been writing to a German spy. The plaintiff was engaged to be married to a German who was interned in the Isle-of-Man. It was stated that the real object of the defendants was to obtain letters from a woman, who was staying in the same house as the plaintiff, for the purposes of a divorce suit. The jury found that the defendant Barker represented himself to be an inspector from Scotland Yard, and that in doing so he was acting within the scope of the defendant Sweeney's authority. They also found that the statement of Barker was made with the knowledge that it was calculated to cause physical injury to the plaintiff. They assessed the damages at £250.

Mr. Justice Avory gave judgment for the plaintiff. He found that the matter was covered by the case of *Wilkinson* v. *Downton* (1897) 2 Q.B. 57, but inclined to the opinion that apart from that case he would have held there was no cause of action. He said: "To hold that every person has a legal right not to be frightened by some false statement made to him by another might lead to an infinity of trumpery or groundless actions; and to say that every one has a legal right to have the truth always told to him and not to be frightened by some lie is undoubtedly a wide proposition." It is interesting to notice that one of the Judges who decided *Wilkinson* v. *Downton* said this: "It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of

action. There is, I am inclined to think, at least one limitation. The shock, when it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself."

Private Property in Ceded Territory.

There is much speculation as to what is to happen to private property in the territories which must inevitably be ceded by Germany as a term of peace. For instance, the German mine-owner of Lorraine—will he still remain *dominus* of the mine and its mineral wealth? The general opinion seems to be that ownership of private property will be studiously respected by the Allies. In this they would follow Germany herself, who, after the Franco-German War, did not interfere with private rights in Alsace and Lorraine. This accords with international law.

A judgment of the United States Supreme Court in the case of *Coffee* v. *Groover* states this: "It is no doubt the received doctrine that in cases of ceded or conquered territory the rights of private property in lands are respected. Grants made by the former Government, being rightful when made, are not usually disturbed. . . . It is true that the property rights of the people in those cases were protected by stipulations in the treaties of cession, as is usual in such treaties; but the Court took a broader ground, and held, as a general principle of international law, that a mere cession of territory only operates upon the sovereignty and jurisdiction, including the right of the public domain, and not upon the private property of individuals which had been segregated from the public domain before the cession."

There is nothing which more strikingly illustrates the extent of Greater Britain than an occasional glance at the proceedings of the Judicial Committee of the Privy Council. In a recent number of the *Law Times* reports, we notice cases going there for final adjudication from all quarters of the earth. From the Supreme Court of Canada comes an appeal as to the powers of expropriation of land for railway and other purposes. The next case is an appeal from His Majesty's Supreme Court in Shanghai, China, dealing with a question of practice and procedure in an

opium case. Another case is an appeal from the Supreme Court of New South Wales touching procedure and evidence in connection with questions between husband and wife. This is followed by yet another which is an appeal from the Supreme Court of Ceylon reversing a decree of the District Judge of Negomba as to the rights of hasband and wife under the Roman Dutch Law. All these come for final decision, before perhaps four or five quiet, thoughtful men sitting round a table in morning costume. The proceedings, which are devoid of all form of ceremony, are conducted in a comparatively small room in an office building on Downing Street, in the metropolis of our great Empire, in that "Tight little Island," which rests in peace, happy in the thought expressed in the old sea song:—

"The sea is merrie England's, and England's shall remain
While Britain's sons have hearts of oak her freedom to maintain."

The report of a Committee of the Bar Council of England, suggests the establishment of a Ministry of Justice. In this country we are especially interested in this as such an office has been in existence in this Dominion for so long that the surprise is that there has been no such office in England. And one is at a loss to know how the legal machine can do without it in the Mother Country. Some of the work which would naturally come to a Minister of Justice is doubtless being done now by the Lord Chancellor, but as nothing has been published as to the many details which would have to be arranged, we need not discuss it further at present.

The stress of war requirements in England has necessitated a departure from the wholesome rule advocated by such journals as the *Law Times*, which, before the war, was resolutely opposed to calling upon Judges to perform duties not connected with their position. In a recent reference to this subject, the above journal joins with the Master of the Rolls in hoping that the time is not far distant when a full and complete severance will be made between executive and judicial duties, and the old position reverted to with strictness.

REVIEW OF CURRENT ENGLISH CASES.

(*Registered in accordance with the Copyright Act.*)

REVENUE—ENTERTAINMENTS DUTY—MUSICAL PERFORMANCE DURING SERVICE OF MEALS—PAYMENTS FOR ADMISSION.

Lyons v. *Fox* (1919) 1 K.B. 11. This was an appeal from a conviction for an alleged breach of a revenue Act which imposed a tax on all payments of admission to any entertainment. The defendants kept a restaurant, and during the service of meals concerts, vocal and instrumental, of a high-class character took place. No charge was made for admission, and the meals were charged for *à la carte* for which a bill was rendered to the customer before he left the restaurant. A person who had finished his meal was allowed to remain and listen to the music, and the dinner concert continued for an hour after the service of dinner had ceased. An unusually strong Divisional Court (Darling, Laurence and Bailhache, JJ., Shearman and Salter, JJ., dissenting) held that the payments made by customers were not "payments for admission" to an entertainment within the meaning of the Act, and quashed the conviction; Darling, J., quoting Dryden's "Alexander's Feast" in proof of the antiquity of the custom of having music at meals.

SHIP—CHARTERPARTY—OWNERS TO TAKE MARINE RISKS—CHARTERERS TO TAKE WAR RISKS—SALVAGE—APPORTIONMENT OF SALVAGE BETWEEN OWNERS AND CHARTERERS.

Pyman, S. S. Co. v. *Lords Commissioners of Admiralty* (1919) 1 K.B. 49. In this case the Admiralty had chartered a vessel on the terms that the owners were to assume marine risks and the charterers the war risks. The vessel broke her propeller shaft, and in consequence was in danger of drifting into a minefield. In these circumstances salvage services were rendered, and a total sum of £3,000 was awarded as salvage, and an arbitrator to whom the matter was referred apportioned the liability for the salvage between the owners and charterers as follows: £2,250 to the owners, and the balance against the charterers, and Bailhache, J., confirmed the reward. The charterers appealed, contending that the whole was a "marine risk" due to the breaking of the shaft of the propeller, but the Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.) affirmed the decision of Bailhache, J., being of opinion that part of the danger to which the vessel was exposed

and from which it was salved was a war risk, and the difficulty of salvage was increased by reason of the latter risk.

MASTER AND SERVANT—SCOPE OF SERVANT'S AUTHORITY—SERVANT ACTING CONTRARY TO ORDERS—TORTIOUS ACT OF SERVANT IN COURSE OF EMPLOYMENT—LIABILITY OF MASTER.

Rand v. *Craig* (1919) 1 Ch. 1. This was an action against a master for an injunction to restrain the tortious acts of his servants, in the following circumstances: The defendant, who was a contractor, employed carters by the day to take rubbish from certain works to his dump, and tip it there. Some of the carters, to suit their own convenience, took the rubbish to a piece of unfenced land of the plaintiffs and dumped it there, and it was held by the Court of Appeal (Eady, M.R., and Duke, L.J., and Eve, J.) that the defendant was not in the circumstances responsible for the tortious acts of his employees, which were done not in the course of their employment, but altogether outside its scope.

EASEMENT—ANCIENT LIGHTS—DOORWAY.

Levet v. *Gas Light & Coke Co.* (1919) 1 Ch. 24. In this case Peterson, J., decided that an easement for light cannot be acquired in respect of a doorway, which was primarily constructed for being closed and thus excluding light. The case might perhaps be otherwise where the doorway is constructed for the purpose of admitting light.

COMPANY—REDUCTION OF CAPITAL—RIGHT OF DEBENTURE-HOLDERS TO OBJECT.

In re Meux Brewery Co. (1919) 1 Ch. 28. This was an application by a limited company for the sanction of the Court to a reduction of its capital in the following circumstances: The company was incorporated with a fully paid-up capital of £1,000,000, in addition to which it had issued perpetual debenture stock for £1,000,000 secured by trust deeds forming a floating charge on all its assets. In 1904 the company lost £800,000, and since that year no dividend had been declared, the profits in each year being applied in reduction of the deficiency which now amounted to £640,000 or more. In 1917, by a special resolution, the company resolved to reduce its capital by writing off the lost capital. The reduction did not involve the release of any liability for unpaid capital, or the return to any shareholder of any

paid-up capital. The application was opposed by certain holders of the debenture stock on the ground that the proposed reduction would be prejudicial to their security inasmuch as it would enable the company to pay dividends on the reduced capital instead of applying the profits to making good the lost capital. The assets, according to the latest balance-sheet, exceeded the debenture stock by about £500,000. In these circumstances, Astbury, J., held that the debenture-holders were not entitled to object to the proposed reduction, which he therefore sanctioned.

COSTS—PRIORITY OF CLAIM OF TRUSTEES FOR COSTS, AS AGAINST MORTGAGEE OF BENEFICIARY.

In re Pain, Gustavson v. *Haviland* (1919) 1 Ch. 38. In this case a beneficiary under a will, who had mortgaged her interest, brought an action against the trustees of the will for an account. The mortgagees were made parties to the action, and an account was ordered, the mortgagees not objecting. The result of the account established that nothing was due from the trustees, and the plaintiff was ordered to pay their costs, which were also declared a charge on her beneficial interest in priority to the mortgage so far as they were incurred subsequent to the order for taking the account.

Correspondence.

BAIL ON HABEAS CORPUS IN EXECUTION.

THE EDITOR OF THE CANADA LAW JOURNAL:

SIR:—The judgment in the case of *Dr. Henry O. Simpson* on his application for discharge on a writ of *habeas corpus* in the Supreme Court of Nova Scotia in November of last year, on a commitment for a violation of the Nova Scotia Temperance Act, is reported in Volume 44, Dominion Law Reports, No. 1, page 137.

It is to be regretted that the conditions on which the Court admitted the applicant to *interim* bail, pending the decision of the Court on the application, are not more fully reported in the statement of the case. There was a condition imposed by the Court when admitting him to bail in $400, that he pay the penalty in the

conviction, which amounted to $100, into Court, and which he did in addition to giving his recognizance, and the money was repaid out to him when it gave a decision discharging him on November 30th, 1918. This circumstance, coupled with that, that the Court expressly refrained from deciding the question as to whether or not a prisoner *in execution* could be bailed on *habeas corpus*, would rather indicate that "*ex parte Simpson* is" *not* "authority for the proposition that pending the decision on a writ of *habeas corpus* . . . the prisoner may be bailed even in execution," to negative the proposition in the language used by the learned annotator to the case.

His interpretation of Archbold's C.O.P. (1844), pages 330, etc., is hardly candid as a reference to the work will shew. Archbold first discusses on that page the subject of bail *in execution* without any reference to the statute of Charles, which he refers to in turn on pages 336-337, and that enactment expressly negatives the right of a prisoner *in execution* to be bailed under that Act, which thus assimilates the statute to the common law. The list of authorities cited in the annotation are, with the exception of the Alberta case, threadworn, and the changes on them have been rung without avail on similiar applications in almost every Court of Canada. The Supreme Court of Nova Scotia, with respect, like Idington, J., in *R.* v. *Whiteside*, 40 C.L.J. 713-714, seems to have left this question undecided.

If in its wisdom the Court or the Legislature deems it advisable to make this disputed right (of bail on *habeas corpus* while in execution) undoubted law, a Crown Rule or statute will put the matter beyond question, as it now is in the Supreme Court of Canada, when that tribunal administering the law of *habeas corpus*, R.S.C. ch. 139, sec. 64; *Ex p. Smitheman*, 9 Can. Cr. Cas. 15-16.

Yours, etc.,

JOHN J. POWER.

[It may be noted that the grant of bail in *Ex p. Smitheman* was upon consent of the Crown.—Ed. C.L.J.]

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Full Court.] [44 D.L.R. 170.

PRATTE v. VOISARD.

Evidence—Handwriting—Proof of—Testimony of experts—Comparison.

Under the law governing proof in the Province of Quebec, the testimony of experts in handwriting by comparison is admissible.

Alex. Taschereau, K.C. and *E. F. Surveyer*, K.C., for appellants.

Belcourt, K.C. and *S. Laurent*, K.C., for respondents.

ANNOTATION ON ABOVE CASE FROM 44 D L.R.

Proof of Handwriting and Documents.

By ALBERT S. OSBORN, New York.

The following annotation is a reflection of the latest and most progressive American view on the subject of handwriting evidence.

The constant but slow tendency of the new precedents in the law in relation to the proof of handwriting and documents is unmistakably in the direction of that procedure that gives aid in promoting justice. Progress is especially shown by the removal of certain ancient restrictions which made it difficult if not actually impossible to prove the facts. The most important step in this direction, in what might be called modern times, was the admitting of standards of comparison, beginning especially with the English statute of 1854. There had been some progress, however, before that time because originally no comparison of any kind was allowed even if there was genuine andwriti ng in the case.

The statute in the federal courts of the United States, allowing standards of comparison, was not enacted until fifty-nine years after the enactment of the English statute, a measure of progress in this country not to be proud of. Following the enactment of the federal statute a number of the belated States passed a similar statute allowing standards of comparison, but in some States the strange law is still in force that no genuine writing can be admitted for comparison either to prove genuineness or forgery. The U.S. federal statute was approved and became a law, February 26, 1913. The same year North Carolina and Indiana passed substantially the same statute, and in 1915 Alabama, Michigan and Illinois adopted the new practice. Most American.

States, the large majority of which had followed the English restrictive practice, continued to follow the old practice long after 1854. The change was not made in New York till 1880 and Pennsylvania courts continued the old practice till 1895.

A few American States, to their credit let it be said, never followed the old English practice at any time but adopted the sensible rule that recollection of a thing was not more reliable than the direct, sustained examination and comparison of a thing. A judge in an early Connecticut case, *Lyon* v. *Lyman*, (1831) 9 Conn. 54, 55. where it was sought to exclude standards, says of witnesses who had testified, "A fair paraphrase of their testimony is, that they *believed* (italics by judge) it to be his handwriting from having seen him write. This, according to the second position would render the testimony admissible. But they *knew* it to be his, by comparing it with his other writings. . . . But I forbear. It has always appeared to be a very feeble objection; and I rejoice to see it overruled."

The early violent prejudice against "the comparison of hands" in large measure grew out of the *Sidney* case in England in 1683 (9 State Tr. 817, 896) and the subject became in some degree a political question and for a long time this case had an unfortunate effect on handwriting testimony, which in some degree continues even to this day. For many years no comparison of any kind was permitted and then finally when it was permitted no standards for the purpose of comparison were admitted. Then for a long time many other restrictions prevailed, reasons could not be given and only a bare opinion could be expressed.

During much of the period of this gradual change there also was a continuous controversy over the question as to whether even a magnifying glass could be used, and the same controversy arose over enlarged photographs, illustrations on a chart, or anything in connection with such evidence by which it was made more effective and in which it differed from the old practice. Naturally the old decisions are full of criticisms of the weak and inconclusive evidence which naturally grew out of these various restrictions and exclusions. Many of these old opinions, defending and justifying the old practice, contained inaccurate and unscientific ideas which have trickled down through the decisions for more than a hundred years and mudded the stream of justice.

In justifying the exclusion of standards of comparison, Coleridge, J., in an old opinion advanced the view that standards of comparison were not necessary because the most reliable means of identifying handwriting was from a recollection, or memory, or impression of the "general character" of the writing, undoubtedly meaning its general appearance. This idea tended to make the evidence of the opinion witness who had simply seen the person write, or casually observed the writing, more valuable than any opinion that could be obtained from study or comparison *even by the same witness*. This ancient idea, although utterly unscientific and refuted numberless times, has continued down to the present day. It has been appealed to time and time again for the purpose of discrediting scientific handwriting evidence. It has been necessary in many modern decisions to refute the old idea. In the case of *Green* v. *Terwilliger*, 56 U.S. Fed. 384, as late as 1892 the writer of the opinion felt obliged to say, in combating the old error,

"In many cases it is more satisfactory to allow a witness to compare the writing in issue with other writings of unquestioned authority as to genuineness, than to compare it with the standard which he may have formed or retained in his mind from a knowledge of the party's handwriting."

Another erroneous old idea formulated long ago in one of these old opinions has for years been quoted as a defense of forgery. The contention was solemnly presented in the old language, that "similitude had more significance as indicating genuineness than dissimilitude had in indicating forgery." The argument thus was that genuine writings for various reasons necessarily differed somewhat from each other, therefore difference in a questioned writing as compared with a standard had little significance. No consideration whatever was given to the opposite reasonable contention that an imitation of a writing would, according to the skill exercised, necessarily be like the original in certain particulars, and especially in general appearance, and therefore mere resemblance alone ought not to be conclusive as indicating genuineness. It would thus be just as accurate to state the opposite of the old formula for it is not simply "similitude" or "dissimilitude" but their character and extent that is significant.

It can easily be understood how if an investigation was taken up with the idea that any resemblance would indicate genuineness and no kind or amount of difference would indicate forgery, that there would be no question as to what the final conclusion would be. This ridiculous contention about the force of similitude naturally permitted the forger to succeed. In an introduction to a book treating of forgery, Professor John H. Wigmore expresses the thought in a sententious way, "Amidst these new conditions, the falsifier again outstrips society for a while. A. Chatterton and a Junius can baffle a community. Well down into the 1800's the most daring impositions remained possible, but society at last seems to have overtaken the falsifier once more. Science and art, in the mass, are more than a match for the isolated individual."

Soon after the invention of photography, when perhaps the science was in a somewhat experimental stage, some legal opinions outlined the dangers surrounding the use of photographs, and these old opinions are still quoted at length even though photography has been carried to a very high point of accuracy. A few decisions have said that enlarged photographs have "greatly assisted" the court, but the restrictive opinions seem to have a longer lease of life and are more frequently quoted. There are numerous States where the question actually is still undecided whether enlarged, illustrative, helpful photographs are actually admissible and in some courts they are still excluded.

The new precedents, however, have gradually tended toward that condition surrounding a disputed document trial which makes it a legally supervised, scientific investigation, in which all of the old unscientific discussions are swept aside and the question is attacked in a modern way with instruments and illustrations and everything that will throw light upon the inquiry, including the opportunity of giving detailed reasons for the opinion expressed.

Those arrayed against the facts are greatly aided in many kinds of cases by certain of these old outgrown decisions, carefully combed out of the

books by diligent advocates, and cited without dates. It would be in the interest of justice if the custom was universal of including the date with every legal reference, for, next to the indestructibility of matter, seems to stand a legal precedent after it is once distinctly stated in an opinion.

Let us suppose that somewhere in seventeen hundred, or eighteen hundred and something, some unscientific man compelled to discuss a scientific subject, hurried perhaps, and, because of possible unfortunate individual experience, it may be somewhat prejudiced, also over-burdened with work or possibly with a liver somewhat out of order, writes out in an opinion some unjustified positive statement, comment, or inference, not necessarily on a strictly law question but on some phase of legal proof. In spite of the progress of science, or the progress of anything, that statement seems to stand fixed for use forevermore; it is one with tables of stone and tablets of brass.

If the statement in this old opinion is actually erroneous, unwarranted or even exaggerated, its immortality is all the more positively assured, as it becomes a beacon of hope, a floating spar, for the zealous advocate who is struggling in deep water. By its aid he cannot perhaps shew that black is white, but that it is at least streaked with gray. The statement will be quoted against other opinions, against technical experience, against scientific investigations, against logical testimony, against reasonable argument, until perhaps some great calamity, some Alexandrian catastrophe, has destroyed all of the libraries. There come trickling down through opinion law these erroneous ideas that have been used over and over again in the effort to befog, to delay and to defeat justice, and in some way they should be properly characterized and discredited in later opinions until they are effectively disposed of or rendered harmless.

The law books contain discussions of phases of a great variety of subjects connected with litigation; there is in fact no limit to the number. When the lawyer sets about preparing a brief on one of these subjects, incidental to the law, the usual practice is not to make an intensive study of the question itself, but rather simply to find in the books what has been said about it. This is not the method of science.

When scientific subjects are investigated and discussed in the law the discussion and investigation should be conducted in accordance with scientific principles and methods. The method of the law, if directed primarily to finding what has been said by someone, and strictly followed, makes no new contributions and corrects no errors. The method of science is directed to finding the fact and incidentally to determining whether what has been said on the subject is true. The law assumes that the question has been investigated, discussed and settled, while science begins with no assumption except, perhaps, that ancient pronouncements are probably wrong.

The treatment of the question of the desirability of admitting genuine writing as a standard of comparison illustrates the unfortunate method of the law. It was contended that this admission of standards would introduce interminable and confusing collateral issues and also it was argued that unfair standards might be selected. England, as we have seen, settled the question in 1854, while Connecticut and a few other American States always followed the enlightened practice now almost universal. When, however, the question was under discussion in other States, as it was for years, the

question was never investigated as to how the practice worked in England and Connecticut. As late as in 1911 one of the U.S. State courts refused to adopt the new practice and cited an old English opinion before 1854, instead of discovering how successful the new rule was across the border in the State of Ohio, a few miles away, where it had been followed for more than forty years.

In law the question may arise as to whether enlarged photographs should be used. A scientific investigation would endeavor to answer the following questions: What are their purpose and what is the argument for their use? Will they aid in shewing the facts? How will they aid? May they mislead or deceive and are they objectionable in any way? Finally, have they been used before and what has been the result of the experience in other cases?

There is no good reason why scientific methods cannot be applied in greater measure at least, in connection with these general subjects. The vital question in law as in science is to discover and prove what is true. The investigation ought to be unhampered and free, in which everything is considered that may throw light on the question and what has before been said should be used for what it is worth and only for what it is worth, and should be tested as all else is tested. There is no doubt that this too rigid dependence upon precedent has tended to retard progress by making legal discussions unscientific and perhaps making legal investigators lazy. There is, however, an awakening on the question, stimulated in large measure by able legal authors who have the courage to put into the law the methods of science, and who argue and prove that the science of the law is alive and growing.

Under the ancient restrictions regarding the introduction of evidence, cases relating to handwriting and documents were surrounded by a violent prejudice that weakened all technical evidence on the subject involved. Then the decisions rendered in these cases under the restrictions that made the evidence weak if not valueless perpetuated and intensified the criticisms and prejudice that actually grew out of the procedure imposed. Numerous of the old text books, reflecting the past, also contained violent and undiscriminating criticisms of technical evidence of this class.

This retention of these ancient ideas is discussed in an illuminating manner by Professor Roscoe Pound, Story Professor of Law and Dean of Harvard University Law School, in a book review in *Harvard Law Review*, March, 1911, in these words:—

"The dogmatism of many really competent experts, the obvious limitations of the crude empiricism of bank tellers, the extravagances of graphologists, and the unhappy operation of over-technical rules of evidence in many jurisdictions, which preclude the use of sufficient data on which to base a sound conclusion, have given rise to a distrust of expert evidence as to writings which to-day is not justified. Mr. Harris's account of the expert in handwriting, written, it is fair to say, over thirty years ago, but unaltered in the current edition of 'Hints on Advocacy,' has no application to the fair, temperate and reasoned statements of what may and what may not be discovered and determined with respect to the authorship and authenticity of documents which is given us in this book. Modern experimental psychology has furnished a sure foundation, confirmed in its application to handwriting

by abundant experimentation and experience, and the ingenuity of the optician has provided standard instruments, giving results that speak for themselves to the layman as well as to the expert."

The striking contrast of the new legal precedents with some of the ancient practice in the proof of documents is conclusively shewn in numerous recent American opinions. Two notable opinions in the courts of the State of New York shew this change in a striking manner. In *Venuto* v. *Lizzo* (1911), 130 N.Y. Supp. 1066, the opinion says:—

"While the testimony of expert witnesses is carefully weighed and accepted with caution, the law allows such evidence. The conclusion of a handwriting expert as to the genuineness of a signature, standing alone, would be of little or no value, but supported by sufficiently cogent reasons, his testimony might amount almost to a demonstration. While the court in this case did not directly refuse to allow the experts to state their reasons, as was done in the case of *Johnson Service Co.* v. *MacLernon*, 142 App. Div. 677; 127 N.Y. Supp. 431, the effect of allowing constant trivial objections and of the erroneous rulings was virtually equivalent to such a denial . . . We might not reverse this judgment for a particular ruling, standing alone; but the cumulative effect of all the rulings and of the constant interruptions of counsel on trivial grounds is such as to induce the belief that the defendant has not had a fair trial, and that, in the interests of justice, she should be permitted another opportunity to present her defence. The order should be reversed and a new trial granted, with costs to appellant to abide the event. All concur."

In the opinion referred to in the foregoing opinion, *Johnson Service Co.* v. *MacLernon*, the court says:—

"The witness was then asked to state the reasons for his opinion. An objection to this question was sustained, and the plaintiff duly excepted. This was error. It is a rule of general acceptance that an expert may always, if called upon, give the reasons for his opinion."

" 'Whenever the opinion of any living person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant:' Chase's Stephen's Digest (2nd ed.), 156.

" 'On direct examination, the witness may, and, if required, must point out his grounds for belief in the identity of the handwriting on the principle already considered. Without such a reinforcement of testimony, the opinion of experts would usually involve little more than a counting of the numbers on either side.' 3 Wigmore on Ev. 2014.

"In this State the practice of permitting handwriting experts to give the reasons for his opinion, and even to illustrate upon a blackboard, has been distinctly approved; *McKay* v. *Lasher*, (1890) 121 N.Y. 477, 483; 24 N. E. 711. The reasons for the expert's opinion, if he had been permitted to give them might, and probably would, have added great force to his testimony; for the mere expression of opinion, standing alone, has little probative force. For these errors, the judgment and order appealed from must be reversed and a new trial granted with costs to appellant to abide the event. All concur. *Johnson Service Co.* v. *MacLernon* (1911), 127 N.Y. Supp. 431."

The words ". . . even to illustrate upon a blackboard" in the foregoing opinion is an unqualified expression of the fact that evidence of this class

may now be presented in the most effective and convincing manner. It is, of course, understood that the making of such illustrations would accompany a detailed exposition of the reasons for the opinion expressed. This is certainly a long way from mere opinion evidence of the old days.

On the general question of allowing experts to give reasons for the opinion expressed the Court of Appeals of New York has said very clearly in *People* v. *Faber* (1910), 199 N.Y. 256 at 268:—

"As has already been expressed by others, from which expressions we have quoted, it is competent for a person offering an expert as a witness for the purpose of shewing the strength of the opinion which he is about to express to specify in detail the observations upon which the opinion is based."

When these new revolutionary precedents, established, as it will be seen by unanimous courts, are compared with the old rulings on these subjects it can be understood what progress has been made, and the result of this progress is shewn by numerous surprising verdicts in cases of this class. Two recent New York cases will serve as conspicuous examples. In the first, six witnesses testified that they saw a certain contract signed, and a jury decided that the document was a forgery, and, in the second, a jury convicted a distinguished member of the bar of a forgery of two words in typewriting that by comparison were connected with his own typewriter.

With the use of the microscope and enlarged photographs (*Frank* v. *Chemical National Bank* (1874), 5 J. & S. 26, 34; affirmed 84 N.Y. 209); the assistance of the chart or blackboard (*McKay* v. *Lasher*, 121 N.Y. 477; and with the help of these new precedents, quoted above, an intelligent counsel and a competent witness are able, in most cases, to prove the facts, and the truth will often prevail against what may at first seem to be great odds.

Numerous lawyers and judges know that important cases of this class have been discontinued and hastily taken from court calendars before trial, but not till after the documents had been photographed and the physical evidence had been arranged in a formidable and conclusive manner for presentation in court. A few years ago many of these cases would have been won against the facts and in favour of fraudulent claimants.

As in all classes of cases, there of course continue to be decisions against the facts, and there are still cases in which it is impossible to prove with sufficient force, against sympathy and prejudice, what is undoubtedly true, but in very many cases involving disputed documents the old despair has passed away. With the new precedents and the practices a practically new profession has arisen, devoted to the investigation of documents and the photographic illustration and scientific proof of such cases in court.

Another definite forward step taken by the courts is in connection with the proof of disputed typewriting. The New York Court of Appeals in a recent case has definitely settled the question as to the admissibility of other typewriting merely for comparison. The court says:—

"I think it may well be doubted whether typewriting can be deemed handwriting within the meaning of the existing statute. Nevertheless, I think the law sanctions the reception of the evidence in question, substantially on the theory adopted by the trial judge. If the impression of a seal were in controversy, it would surely be competent to shew by other

impressions from the same sealing instrument that the impression was invariably characterised by a particular mark or defect . . ."

"These several cases base the rulings which have been mentioned upon the assumption or proof that a typewriting machine may possess an individuality which differentiates it from other typewriters and which is recognisable through the character of the work which it produces. Inasmuch as its work affords the readiest means of identification, no valid reason is perceived why admitted or established samples of that work should not be received in evidence for purposes of comparison with other typewritten matter alleged to have been produced upon the same machine." *People* v. *Storrs*, N.Y. (1911), 100 N. E. 731, 732.

There are courts, however, that are still strangers to all these modern methods of presenting disputed document cases, but there is progress all along the line, and it is now coming to be recognised, as is said in the American and English Encyclopedia of Law, that "This kind of evidence, like all other probable evidence, admits of every degree of certainty, from the lowest presumption, to the highest moral certainty," or, as one of the opinions quoted above says, ". . . might amount almost to a demonstration." All the honest claimant, the reputable lawyer, asks is that the evidence be taken for what it is worth and without prejudice. More than one "demonstration" during these latter years has dazed old practitioners who in the past have won cases, not by evidence but by tactics and by objections. In more than one recent case, those against the facts, when confronted with the evidence and especially the illustrative photographs, have actually surrendered before or during trial, paid all expenses, and discontinued the case.

The variation of degree of force in evidence as to handwriting and documents has long been recognized in a general way, but it too long has been impossible for those in the right to prove their case, especially in those jurisdictions where they still continue actually to listen to long arguments as to whether reasons can be given, or illustrations can be made, or even a magnifying glass can be used in court, or enlarged photographs, or a microscope, or any of the modern approved scientific aids to investigation that are welcomed everywhere except in a court of law. The old "objector," when sustained, either excluded or made harmless the evidence necessary to prove the case, but his day is ended in most courts. One would be inclined to think, however, in going into a few courts, even in these days, happily growing less each year, that the date was sixteen hundred and something, instead of the twentieth century, and that a witchcraft case might actually be on trial.

There are still abuses to be corrected, and unfortunately, there continue to be frauds and charlatans among the specialists who testify on these technical subjects, who, let it be plainly said, ought to be in jail with the lawyers who exploit them and keep them in business, but there need no longer be despair about cases of this class. With the enlightened procedure now almost universal, adequate preparation by the counsel on the right side, and the use of the information on the subject now available, the errors of the ignorant witness and the vicious pretensions of the corrupt witness can usually be exposed. This cannot be done, however, when it is assumed, as was usual a few years ago, that any "conflict" of such testimony of any kind discredits the good as well as the bad.

When this prejudice was more common it is easy to understand how a "conflict" would usually be brought about by the lawyer against the facts in order that he might argue that none of the testimony on the subject ought to be considered. "Conflicts" of this kind are still secured, and may accomplish their evil purpose, if prejudice prevails and it is erroneously assumed that all testimony of the kind is of equal force and value. This is just what those against the facts want court and public and press to assume. Too often a portion of the press snatches at and magnifies the news value of such incidents, and thus unintentionally may help promote injustice.

Those who are not informed may say, "Of what use is such evidence when witnesses always disagree," not knowing that the "conflict" is actually brought about, not to prove the point at issue but solely for the purpose of appealing in argument to this erroneous notion on the subject. The legal precedents as quoted and the general press in many cases and numerous technical articles on the subject, shew a decidedly changing point of view and a correct understanding of the facts.

The modern court conducted under enlightened rules asks that the evidence be carefully weighed and that all prejudice be eliminated and promptly accepts every proper help that will throw light on the inquiry. Objections to accepted scientific aids are promptly overruled and argument on the subject is hardly tolerated. Not now once in fifty times are photographs, microscopes and charts excluded, and in some jurisdictions such exclusion, like the exclusion of reasons for the opinion given, is actual reversible error.

Blackstone said many years ago that the law is the most progressive of all the sciences because it goes out and enlists the services of all the other professions, but in certain fields it has done this with such caution that there are many who would resort almost to revolution in order to bring about what should be accomplished in an orderly way.

In the law, as elsewhere, those interested in true progress must see to it that the best of the past is preserved and must always adopt with caution the new thing. As with every department of human affairs there are two parties in the law, those who on principle hark back to the past and are opposed to changes of any kind. Opposed to them there is another party interested in progress who all the time are looking forward to better things as time goes by. Hasty and unwise adherence to one of these opposed policies leads to danger, disorder and revolution, while strict adherence to the other is stagnation and death.

Handwriting Evidence by Lay Witnesses.

About the weakest and most inconclusive evidence ever presented in a court of law is the opinion evidence of lay witnesses regarding the genuineness of handwriting. It is an unwarranted assumption of the law, established by long practice and recorded in many opinions, that a knowledge of handwriting can be gained by the most superficial observation of the act of writing. The legal precedents even go to the ridiculous extent of assuming that an observer actually may be qualified to give an opinion under oath as to a disputed signature in a controversy of great importance who has seen the alleged writer sign his name only once more than twenty years before. It is difficult to imagine anything more unscientific than this.

The law thus takes it for granted that a mere casual glance at the act of writing many years before gives, or may give, to an observer, in some mysterious, unknown way, what the law calls "a knowledge of a handwriting." From a scientific standpoint, and also from a common sense standpoint, the assumption is utterly ridiculous and would be so considered had it not been dignified by long use. Knowledge that rises to the point that qualifies a witness to give formal evidence in a court of law on such a question is not gained in any such manner.

It is said in some opinions, seemingly in an apologetic way, that objection "goes to the weight of the evidence rather than to its competency" and the court does not undertake to say how much observation is necessary in order to qualify a witness to testify. The court should undertake to say this very thing, and it is utterly unscientific not to say it. Any reasonable man ought to be able to say that no such cursory observation, without any specific attention, or interest in the question, qualifies a witness to give formal testimony under oath in a court of law, any more than walking through a law library would qualify a man to give an opinion on a legal subject.

It is possible to become familiar with a handwriting by seeing it often and seeing it written many times, but such a knowledge is usually very superficial and unreliable and in any event is not gained when no particular attention is given to the act and that act is performed only a few times many years before.

A witness called upon to testify on the question of disputed handwriting should always be examined in advance by counsel and by the court and if he is asked whether he would risk his own property, to the extent perhaps of thousands of dollars, upon his own knowledge of the particular handwriting in dispute, the honest witness will be likely to say that he would not dignify his opinion on the question in any such important manner.

The identification of handwriting many times beomes a difficult scientific problem and in any important matter should not be undertaken by the uninformed and the untrained. One of the common fallacies in connection with the subject is the assumption that handwriting can be positively recognized by anyone as a face is recognized, by a sort of intuition. Some of the discussions even go to the point of contending that evidence based on this kind of recognition is particularly reliable. The exact opposite is the fact.

One of the most uncertain and unreliable kinds of evidence that ever appears in a court of law is evidence upon the recognition of a person, seen infrequently, or long before, or perhaps only once, from his features and general appearance alone. Thousands of errors have thus been committed and the liability of error is so great that such evidence has very little weight, and should have even less than is given to it.

The same danger of error arises when it is assumed that the recognition of a handwriting is a very simple and easy task. There are certain great classes or schools of handwriting in which there are certain general similarities, like the similarities in race or complexion, or general appearance in persons, and error is liable to follow in depending upon recognition from mere general appearance in identifying a handwriting as in identifying a person.

If a handwriting is clumsily imitated only in a general way, including only its conspicuous features, it at once takes on, in some degree, the general

appearance of the writing imitated and is immediately identified as the writing of a suspected party, or as genuine writing, by one who depends only upon this general appearance. The whole subject of handwriting identification is pervaded by a certain intangible notion that there is a sort of occult ability developed even by an unskilled, unscientific observer, which can be depended upon in this recognition of a handwriting.

This practice of calling on the unskilled has no doubt grown out of necessity, but it has been given a dignity and importance which it does not deserve. Stupid, half blind, unskilled persons are asked to give evidence on this subject of handwriting identification who are no more qualified than they would be to make a chemical analysis, or determine whether a law is unconstitutional, or whether a patent specification covers a principle already incorporated in another patent.

In proving uncontested documents witnesses are called to prove the signatures who are assumed by the law to "know the handwriting." This proof, as a rule, is of the most perfunctory character and is not assumed to have much really technical evidential value. The same character of proof has however been carried over into most important cases in which handwriting is seriously disputed, and may be skilfully forged. This character of handwriting evidence, that may answer the purpose of the law and not imperil the interests of justice in cases where no dispute has arisen, may be very dangerous unless the evidence is presented in a way that makes it possible to estimate its true value.

It also should be plainly said that the real purpose of this evidence by lay witnesses often is not what it purports to be. It is supposed to give help in solving a technical scientific question, but in most cases is in fact an opinion by the witness as to his judgment on the case as a whole. Especially in a community where all the various citizens are known in a general way to each other, at least by reputation, such evidence may be of considerable force in a disputed handwriting case. A prominent citizen who consents to testify really gives his opinion on the merits of the whole controversy rather than primarily on the technical subject presented to him. This certainly is the fact in many cases of this kind. Untrained witnesses who have not studied the subject of disputed handwriting will err in either direction in such a case by inferring that the slightest resemblance indicates genuineness, or, on the contrary, that the most trivial variation indicates forgery.

Witnesses of this character can sometimes be cross-examined very effectively if proper preparation for cross-examination is made. If such witnesses merely give opinions without any reasons whatever, the evidence may be unassailable from a technical standpoint and its only real value is that it indicates the opinion of the witness regarding the general merits of the case. It is often possible to secure a number of such witnesses, often perfectly reputable and honourable men, but totally unqualified technically, who will readily testify that the most glaring forgery is genuine if their friendship or their prejudice incline that way, or will testify that an undoubtedly genuine signature is a forgery if it contains the slightest variation from ordinary genuine signatures and they think the case should be so decided. They are not in fact qualified to give any opinion but are skillfully led to see the problem

as is suggested to them. They are not dishonest but technically uninformed, and often, if not usually, consciously or unconsciously, prejudiced.

As has been well pointed out in numerous modern decisions and many discussions of handwriting expert evidence by scientific law writers, the value of document expert evidence, unlike most expert evidence, arises, not from the mere opinion itself but from the reasons for the opinion. This sensible test in a disputed handwriting case greatly minimizes, if it does not actually destroy, the value of the testimony of untrained witnesses who presume to give only mere opinions on the subject.

The careful trial lawyer cannot, of course, wholly ignore such evidence which may be marshalled on either side against the interests of justice, but will endeavour to use it to support and confirm correct technical testimony given with reasons and illustrations. Some witnesses of this class are conceited and have been led to think they have a peculiar ability and they will undertake to go into details and, without technical qualifications, will attempt to give definite reasons for their opinions. Detailed evidence by such a witness is almost certain to be full of errors and, as a rule, such a witness can be successfully attacked by a qualified counsel.

Proof of handwriting by lay witnesses would be less dangerous if given in response to a question something like this, "From what knowledge of this handwriting you have and from the circumstances of the case and the conditions surrounding the production of the writing, is it your opinion that this handwriting is genuine or not?" Whether the question is propounded in this way or not, this is exactly the way in which it is usually answered. On the pretense of giving technical evidence a witness is in fact allowed to give his opinion on the general merits of the case as affected perhaps by his prejudice or his actual interest.

In disputed will cases one collection of relatives, more or less distant, and friends more or less friendly, on one side give evidence that a signature is genuine, and a similar group, wholly untrained, without scientific knowledge, and perhaps unconsciously acting under suggestion, give exactly opposing evidence. It may be practically impossible to dispense with such evidence entirely but it should be received with caution and should not be dignified in legal opinions or in legal literature more than it deserves and it certainly does not deserve much.

Province of Manitoba.

COURT OF APPEAL.

Perdue, C.J.M., Cameron and Fullerton, JJ.A.] [44 D.L.R. 185.

ROBB v. MERCHANTS CASUALTY CO.

Insurance—Accident policy—Construction.

A clause in an accident insurance policy, insuring against loss sustained while "riding as a passenger within the enclosed part of

any public passenger conveyance provided for the exclusive use of passengers and propelled by steam, compressed air, gasoline, cable or electricity, or while riding as a passenger on board a steam or gasoline vessel licensed for the regular transportation of passengers, and such injuries shall be due directly to or in consequence of the wrecking of such car or vessel," does not include an accident while attempting to leave a passenger elevator in a privately owned building. It is from the words and the context not from the punctuation that the sense must be collected.

ANNOTATION ON ABOVE CASE FROM 44 D.L.R.

Insurance—Polices Protecting While "Passengers in or on Public and Private Conveyances."

By F. J. LAVERTY, K.C., Montreal. Author of "*Insurance Law of Canada.*"

The liability of insurers under policies protecting insured while "passengers in or on public or private conveyances" has been the subject of frequent judicial consideration.

Public conveyance naturally suggests a vessel or vehicle employed in the general conveyance of passengers; private conveyance suggests a vehicle belonging to a private individual: *Ripley* v. *Hartford Passenger Assurance Co.*, (1872), 16 Wall (U.S.) 336, 479.

In *Oswego* v. *Collins*, (1885), 38 Hun (N.Y.) 171, an omnibus was declared not to be a public conveyance.

In *Ripley* v. *Railway Passenger Assurance Co.*, 20 Federal Cases, No. 11854, it was held that "travelling by private conveyance" includes self-locomotion; it would have been different if the clause had read "travelling in"; see 9 Cyc. p. 863, Vo. Conveyance.

The paymaster of a railroad company travelling from station to station, and stopping between them to pay the employees, is not while doing so a passenger in a conveyance: *Travellers Assurance Co.* v. *Austin*, (1902), 94 Am. St. Rep. 125.

One injured while attempting to alight from a moving electric street car is to be regarded as having been injured "while riding as a passenger" in the car: *King* v. *Travellers' Assurance Co.*, (1897), 65 Am. St. Rep. 288.

Where the terms of the policy read "riding as a passenger in a passenger conveyance" an injury received while riding on the platform of a car is not within the condition: *Ætna Life* v. *Vandecar*, (1898), 86 Fed. 282; *Van Bokkelen* v. *Travellers Assurance Co.*, (1901), 167 N.Y. 590.

Where a passenger on invitation of the railroad superintendent left a coach to ride on the engine, and while so riding was killed, he did not thereby lose the character of a passenger, and the engine was part of the conveyance: *Berliner* v. *Travellers Assurance Co.*, (1898), 66 Am. St. Rep. 49.

Where the clause read that the insured was protected while riding as a passenger "in or on a public conveyance" and the insured was killed by being thrown from the platform of the car, the company was condemned: *Preferred Accident Insurance Co.* v. *Muir*, (1904), 126 Fed. 926.

A passenger elevator is one used for passengers, although also used for freight: *Wilmarth* v. *Pacific Mutual*, 168 Cal. 536 (1914). It was here held that the words "passenger elevator" are to be construed in their ordinary and popular sense, hence the evidence that among manufacturers of elevators, the term had a definite meaning and that an elevator used for the carriage of both passengers and freight was not a "passenger elevator" was properly excluded.

Where the body of the insured when injured was not wholly within the elevator, and the policy covered injuries "while riding in an elevator," it was still held to apply: *Ætna Life Assurance Co.* v. *Davis*, (1911), 191 Fed. 343.

A similar decision was rendered in *Depue* v. *Travellers Assurance Co.*, (1909), 166 Fed. 183, where the policy covered loss of life as a result of "bodily injuries effected while in a passenger elevator"; no one saw the accident; the body of the insured was found hanging head downward in the elevator, having been caught between the roof of the elevator and the floor of the building.

Where a policy insured against death or injuries resulting "while riding as a passenger in a place regularly provided for the transportation of passengers within a public conveyance," and the insured was injured while attempting to board a moving street car, but before he had entered the same, the company was released from liability: *Mitchell* v. *German Commercial Accident Co.* (1913), 161 South Western Reporter 362.

A transfer company renting picnic waggons was held not to be a common carrier; a common carrier being one who undertakes for a consideration to carry indiscriminately passengers as long as there is room in the conveyance, nor is a livery man a common carrier within the meaning of a clause in a policy covering insured while riding "as a passenger in a public conveyance, provided by a common carrier for passenger service:" *Georgia Life Insurance Co.* v. *Easter*, 66 Southern Reporter 514 (1915).

A similar decision was rendered in a case where the policy covered the insured "while a passenger in or on a public conveyance" and he was pushed by persons getting off an express train and fell between the platform and the train: *Rosenfeld* v. *Travellers Assurance Co.*, 161 N.Y. Supplement 12 (1916).

Where the clause read "while riding as a passenger in a railway passenger car" it was held that this provision was broad enough to cover death by being thrown from the platform of a passenger train, while passing from one car to another, the word "in" being interchangeable with "on": *Schmohl* v. *Travellers Assurance Co.*, 189 South Western Reporter 597 (1916).

Where a policy read that no benefit would be paid for injuries received "while the insured was on a locomotive, freight car or caboose used for passenger service," and it was proved that the caboose, in which he was riding at the time of his death was used solely for railway employees and drovers in charge of live stock shipments, it was held that it was not "used for passenger service," in the common and ordinary meaning of the term: *Standard Accident Assurance Co.* v. *Hile*, 132 Pacific Reporter 333 (1913).

A taxicab has been held to be a public conveyance: *Primrose* v. *Casualty Co. of America*, 81 Atlantic Reporter 212 (1911).

Under this last case an annotation will be found in 37 L.R.A. (n.s.) 618, dealing with the scope and construction of a provision for indemnity in case

of injury while riding in or on a public conveyance; also in 55 L.R.A. (1915C) 456, under the report of the decision in *Georgia Life Assurance Co.* v. *Easter*, *supra*.

Some policies make an exception of the risk involved in standing, riding or being on the platform of a railway car or entering or attempting to enter, leaving or attempting to leave any public conveyance while the same is in motion. Provided the car was in actual motion at the time the insured has his hand on it, at the moment of attempting to enter, no excuse will defeat the company's right to set up this exception in defence: *Huston* v. *Travellers Assurance Co.*, (1902), 66 Ohio St. 246.

In Canada, we find a decision of *Powis* v. *Ontario Accident Assurance Co.*, (1900), 1 O.L.R. 54, holding that a person was "riding as a passenger on a public conveyance" when he had his foot on the step before the vehicle had begun to move. This judgment was based on an English case, *Theobold* v. *Railway Passengers Assurance Co.* (1854), 23 L.J. Ex. 249: also *Northup* v. *Railway Passengers Assurance Co.* (1869), 2 Lans. 168, and a very similar case of *Champlin* v. *Railway Passengers Assurance Co.*, (1872), 6 Lans. 71.

In another Ontario case, the plaintiff had stepped off a tramcar into the path of an approaching motor car; he stepped back on the tramcar, which at that moment caught and injured him; it was held, reversing Meredith C.J.C.P., that he was not at the time of the accident a passenger in the tramcar; see *Wallace* v. *Employers Liability Assurance Co.* (1912), 2 D.L.R. 854.

A person riding a bicycle "is not travelling as an ordinary passenger" in a vehicle: *McMillan* v. *Sun Life Assurance Co.*, (1896), 4 S.L.T. 66 (Scotland).

A number of pertinent decisions will be found in MacGillivray's Insurance Law (1912), page 925 *et seq.*

Bench and Bar

Appointments to Office.

Arthur Cyril Boyce, of the City of Sault Ste. Marie, Esquire, K.C., to be a Member of the Board of Railway Commissioners for Canada. (Oct. 4, 1918.)

John Gunion Rutherford, of the City of Calgary, C.M.G., and Simon James McLean, of the City of Ottawa, to be Members of the Board of Railway Commissioners for Canada. (Nov. 8.)

Professional Etiquette.

We fear that those of us who smoke are somewhat selfish creatures and apt to have too little regard for those who object to smoke.

Osgoode Hall, our headquarters in Ontario, has hitherto been considered a place where smoking is taboo, except in the places

provided for the purpose. But lately a learned King's Counsel might have been seen in his robes puffing away at a pipe in his mouth while he paraded the upper quadrangle. The combination of robes and pipe seems a little incongruous to say the least. But if a King's Counsel may smoke freely about the Hall, why not everyone else? Why not smoke in the Courts while waiting for a case? Smokers are often careless, and have occasioned many fires. A fire at Osgoode Hall might have very disastrous and irreparable results, and we think the profession should be careful how they encourage a practice calculated to jeopardise that building. Moreover, having regard to the fitness of things, we think the practice of smoking elsewhere than in the provided places at Osgoode Hall should be discouraged both by the precept and example of the leading members of the profession, and it might well be a standing instruction to all students not to smoke either in the passages or any of the offices of the Courts at Osgoode Hall There is a smoking room provided. That ought to be sufficient.

Flotsam and Jetsam.

There is much solemn discussion in some of the American legal journals as to whether the President of the United States may leave his own country. It does not strike those whose rulers can go where they like without restraint as of much consequence whether he ought or ought not so to do. He has done it, and he cannot be turned out of office for taking the jaunt. Whether his going out of the United States has been beneficial to the Allies some have doubted, but however that may be, we shall all be glad if England's toil of centuries to protect the freedom of the seas may ensure his safe journey. It is to be hoped that the precedent set by Mr. Wilson in going abroad will be followed by his successors, as there is nothing like travelling in foreign countries to cure insularity and enlarge the vision.

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RIGHTS OF VEHICLES ON HIGHWAYS.

The judgment of the Second Divisional Court, Supreme Court, Ontario, in *Sercombe* v. *Vaughan* comes as a surprise to the motor truck community, but will be a great comfort to the municipalities who have hitherto built bridges without regard to the traffic of the heavy motor cars which have recently come into use throughout the Dominion. This decision is so far-reaching and important as to demand more than passing notice.

This case came on appeal from the judgment of Coatsworth, J.J.C.C. York, who found in favour of the plaintiff for damages in respect of an accident to his motor truck by falling through a bridge on a public highway in the township of Vaughan. It is provided by the Act to Regulate the Load of Vehicles operated on Highways (6 Geo. V. c. 49) that no vehicle shall be operated upon wheels, etc., in excess of a total weight of 12 tons. It is also provided that the rate of speed shall not, as to vehicles of the description of the one in question exceed 8 miles an hour. The motor in question, with its load, was less than 12 tons, and the rate of speed was less than 8 miles an hour. It is provided by another section of the Act as follows: (Sec. 6) "No vehicle shall have a greater width than 90 inches, except traction engines, which may have a total width of 110 inches." Any person who contravenes any of the provisions of the Act is liable to a fine. The width of the motor in question was 96 inches.

It was found by the learned Judge of the County Court as a fact that the width of the motor had nothing to do with the cause of the accident, which simply and solely resulted from the bridge being too light in construction to carry the motor and its load, which were not in excess of the statutory requirements. It was held by the Divisional Court, as appears by the note of the

case in 15 O.W.N. page 410, "that the extra width had, or might have had, nothing to do with causing the accident, has no significance. The truck should not have been there at all. The plaintiff smashed the defendant's bridge unlawfully and should pay for it. It was of no importance that the same thing might have happened had the plaintiff used a lawful instrument—the fact was that he did not. The appeal should be allowed with costs, the action dismissed with costs, and the defendants should recover on the counterclaim the sum necessary to replace the bridge, to be agreed upon by the parties, or, in the absence of an agreement, on a reference. The defendants should have their costs throughout on the County Court scale."

It was clear, and there was no attempt to deny the fact, that the bridge was not sufficiently strong to carry the weight allowed by the statute. The accident was due entirely to the defendant's insufficient highway, and if the motor had been 90 inches in width instead of 96 the plaintiff was admittedly entitled to damage, but as it was 96 inches in width he could not.

It is also clear from the whole tenor of the statute, which, by the way, is an Act "to regulate the load of vehicles operated on highways," that the intention of the Legislature was to have bridges of sufficient strength to carry the heavy vehicular traffic referred to throughout the Act. The statute gives no reason for the limited width in section 6. The extra width of a vehicle had nothing to do with the accident.

If the statute had required a certain style of lamp, would a breach of such a provision excuse the municipality from not having proper bridges? If not, it is difficult to see how this extra width, which had nothing to do with the accident, was so important in the mind of the learned Judge who delivered the judgment of the Divisional Court.

It may be remarked that section 6 is foreign to the subject matter of the statute. What it means, or what it is intended to provide for or against, is a mystery. The width of the truck has manifestly nothing to do with the safety of the bridges. It is not coupled with the previous section which refers to the weight of the load, nor has it anything to do with the rate of speed. These

provisions are clearly subjects which the statute was passed to provide for in respect to the safety of bridges. There is no express prohibition against the use of the highway by a truck 96 inches wide, but there is a fine imposed on anyone using a truck of that width. The learned Judge who delivered the judgment of the Divisional Court in effect lays down the broad proposition that no person, being a trespasser on a highway, has any right whatever, and that the presence of this truck on the highway was a trespass. Admitting for the moment that it was a trespass, was the truck subject to destruction by the defendants? Its destruction was the direct result of a breach of a statutory duty. The common law as well as the above statute imposes upon the municipality the obligation to provide bridges sufficient to carry loads not exceeding statutory prohibition. The plaintiff was a wrong doer, but does that make him a trespasser?

There is authority for the proposition that even to a trespasser there is a certain duty of protection: *Diplock* v. *Canadian Northern R. Co.*, 30 D.L.R. 240, 53 Can. S.C.R. 376, affirming, 26 D.L.R. 544. In the U.S. case of *Bourne* v. *Whitman*, 209 Mass. 155, 35 L.R.A. (N.S.) 701, the Supreme Court of Massachusetts, held that the breach of a statutory duty by a person using the highway does not make him a trespasser, nor liable for injuries not due to his breach of the statutory duty.

There are numerous cases in reference to rights and liabilities in connection with the breach of statutory duties. Some of these throw light on the case before us. We would refer to the following: *Davey* v. *London and S.W. Ry. Co.*, 12 Q.B.D. 70; *G.T.R.* v. *McAlpine*, 13 D.L.R. 618, 49 C.L.J. 665; *Turgeen* v. *King*, 51 S.C.R. 588; *C.P.R.* v. *Frechette*, 22 D.L.R. 356; *Watkins* v. *Naval Coll.* (1912), A.C. 693; *Smith* v. *G.T.R.*, 32 O.L.R. 380.

The result of these decisions may be summed up as follows: Where a plaintiff is suing for damages occasioned by negligence of a defendant, the breach of a statutory enactment, unless it directly promotes or causes the danger of which the plaintiff complains, does not constitute a defence to the plaintiff's claim. One is rather relieved by the presence of authorities which go to support what may be called the common sense view of the

County Court, and not be compelled to accept as the law the somewhat technical view taken by the Divisional Court.

The cases relied on in the judgment of the Divisional Court do not appear to support the conclusion arrived at, and apart from being distinguishable from the case to which they were applied, are hardly in accord with the modern trend of decisions dealing with the law of negligence. These cases are *Goodison Thresher Co.* v. *McNab*, 44 Can. S.C.R. 187, affirming the majority of the Court of Appeal of Ontario, 19 O.L.R. 188; *Roe* v. *Wellesley*, 43 O.L.R. 214—a single Judge decision; and the Saskatchewan case of *Etter* v. *Saskatoon*, 10 Sask. L.R. 415, 39 D.L.R. 1.

In *Linstead* v. *Whitchurch*, 36 O.L.R. 462, 30 D.L.R. 432, the *Goodison* case was virtually repudiated and a diametrically opposite view reached by the Court. It must be remembered that in the *Goodison* case both Chief Justices of Ontario (Sir Charles Moss, concurring with the trial Judge, Anglin, J.) and of Canada (Sir Charles Fitzpatrick), together with Girouard J. and the present Chief Justice of the Common Pleas (R. M. Meredith,) dissented. Meredith, C.J.O., in the *Linstead* case, after carefully weighing the reasoning in the *Goodison* case and its weight as a precedent, came to the conclusion that "owing to the conflict of judicial opinion in the (*Goodison*) case, the question presented in this (*Linstead*) case should be treated as *res integra*."

In view of the *Linstead* case, the Saskatchewan case of *Etter* v. *Saskatoon* should hardly have any weight as a precedent, at least so far as Ontario is concerned, apart from the fact that it is distinguishable, in that that case dealt with a statute which expressly prohibited the vehicle "to be used or operated upon a highway" unless it complied with the statutory requirements.

In *Roe* v. *Wellesley* the automobile, driven by an infant at a great speed, dropped into a hole at the edge of a bridge forming part of a highway. Latchford, J., said (and he might have made it the basis of his decision, on the principle of *causa causans*, or proximate cause, or ultimate negligence): "I desire to add that, in my opinion, no duty is cast upon a municipality to maintain its roads in such repair that they shall be safe for automobiles driven at the speed at which the plaintiffs were proceeding."

"The whole law of negligence in accident cases," says Lord Sumner, in delivering judgment in the *B.C. Electric Ry. Co.* v. *Loach* (1916), 1 A.C. 719, 23 D.L.R. 4, "is now very well settled . . . and its application is plain enough. Many persons are apt to think that, in a case of contributory negligence, the injured man deserved to be hurt, but the question is not one of desert, but of the *cause* legally responsible for the injury. The inquiry is a judicial inquiry. It does not always follow the historical method and begin at the beginning. Very often it is more convenient to begin at the end, that is, at the accident, and work back along the line of events which led up to it. The object of the inquiry is to fix upon some wrongdoer the responsibility for the wrongful act which has caused the damage. It is in search not merely of a causal agency, but of the responsible agent. When that has been done, it is not necessary to pursue the matter into its origins; for judicial purposes they are remote."

This view seems to be followed in strong Amercian decisions and is in entirely in accord with the trend of decisions in modern negligence law. The Supreme Court of Delaware, in *Lindsay* v. *Cecchi*, 3 Boyce 133, 35 L.R.A. (N.S.) 699, held that the failure of an automobile driver to have the statutory license will not render him liable for an injury in case of accident, unless such failure had some causal relation to the injury.

Negligence of the municipality in such case would be presumed by the application of the well-known principle of *res ipsa loquitur*. *Kearney* v. *London, etc., R. Co.* (1871), L.R. 6 Q.B. 759. "The defendants were under common law liability to keep the bridge in safe condition for the public using the highway to pass under it," said the Court. This decision has been followed in the State of New York, in the case of a building falling into the street. "Buildings properly constructed do not fall without adequate cause:" *Mullen* v. *St. John* (1874), 57 N.Y. 567, 569. See Pollock on Torts, 9th ed., p. 533.

In *Dick* v. *Vaughan*, 34 D.L.R. 577, 39 O.L.R. 187, a similar action was brought to recover damages because the plaintiff was compelled to travel by another way owing to the insufficient carrying power of the bridge. The action was dismissed because

the damages were held to be too remote, but the duty of the municipality as to the safety of the bridge and its liability in the event of accident, was not questioned. Meredith, C.J.C.P., remarking it to be one "owed as much to the beggar on foot, or the driver of a coach and four, as to the plaintiff; and a duty any one of them equally might have enforced by laying an information against the municipality."

We venture to think, the judgment of the County Court was correct and should have been sustained.

THE CONTROL OF JUVENILE COURTS.

It is cheaper and more humane to prevent crime than to imprison criminals, and one of the most beneficent developments of the 20th century is the Juvenile Court. But if a Juvenile Court is to be useful and do the work which it is intended to do, it is absolutely necessary that it should be properly equipped, conducted with dignity and decorum, and receive the support and sympathetic treatment of the authorities which called it into existence, and that governmental authority to which it is responsible.

The disgraceful treatment of the Juvenile Court of the city of Toronto, by the City Council, is a public scandal, and points to the necessity of a radical change in the control of these Courts. The dignity and decorum of a Court cannot be maintained without proper accommodation. The accommodation provided by the city for this court-room has hitherto consisted of a space without any ventilation or conveniences, walled off by canvas somewhere in the roof of the City Hall. The Judge, all the officers of the Court, the juvenile delinquents, and their parents all sit around one large table. The financial appropriation made by the city has been quite insufficient to provide an adequate and efficient staff. To make matters worse, the Judge inherited a staff of officials who were not subject to dismissal by him.

Recently the Judge found it necessary to recommend the dismissal of one of his subordinate officials, and his recommendation

was approved and acted upon by the Attorney-General. The trouble appears to have started with a conflict of opinion as to how the Court should be conducted, the Judge adopting the policy that where the object is to cure, rather than to punish, frequent remands are desirable to enable the Judge to keep in touch with the delinquent.

It so happened that this particular official was an ex-alderman, and ex-aldermen have a great appreciation of the effectiveness of "pull." He openly stated that he would get even with the Judge. But to get rid of a Judge, who is appointed for life subject to good behaviour, is not an easy thing to do. An ally was found in one of the aldermen at present sitting in the City Council. A campaign of criticism and publicity was started, and then the idea was conceived of holding a public investigation of the Court, apparently with the design that the usefulness of the Judge would be so impaired by the newspaper headlines during the conduct of this investigation that ultimately it might be necessary for the authorities to find a substitute. Accordingly a resolution was passed by the City Council calling upon the Attorney-General to hold a public investigation. Of course, nothing happened.

The next move of the City Council was on passing an appropriation to instruct the treasurer to pay for only four months, and they intimated to the Attorney-General that they would not authorize any further expenditure until their demand for an investigation had been acceded to.

From time immemorial public respect for the Court has been regarded as the foundation of Anglo-Saxon civilization, and the rule has always been scrupulously observed that nothing should be done to lower respect for the courts. A Judge may be impeached for malfeasance, but we can search in vain for a precedent for putting a Court of justice on the level of a municipal firehall department. Democracy comes pretty near to Bolshevism when the aldermen of a city like Toronto, in order to please a dismissed official, try to force the Attorney-General of the Province to break all records and do something which would be subversive of good government.

It soon became apparent to many who were interested in the

welfare of the children that the usefulness of the Court would be injured if these tactics of the wirepullers were permitted to continue; and so one of the best known and respected leaders of social workers took up the matter and made an independent investigation, collecting information from a number of persons who have had actual experience in social work and have had business dealings with the Court. Without exception, these competent and unbiased persons upheld the policy of the Judge, and are unanimous in their testimony of his fitness for the position. They deplore the conditions under which the Court has been conducted, and the totally inadequate support provided by the city.

We are not so much interested in the personal element as with the danger and more important difficulty which arises from dual control. The moral is plain. So long as the city authorities pay the Judge, the ward politicians will want to have a finger in his pie. The ordinary city alderman does not know anything about social work, and he is not equipped to form an opinion as to how a Juvenile Court should be conducted. It is absurd to expect him to do so. On the face of it, there would appear to be no sufficient reason why the Provincial Government, who control the appointments of the Court, should not also pay the salaries. The city is not called upon to provide funds for any other branch of the administration of justice.

The lesson of this experience in the metropolitan city of Ontario may prove useful. All Juvenile Courts should, so far as their maintenance and control are concerned, be in the same position as any other Court of justice.

POWERS OF PROVINCIAL COMPANIES.

Although the decision of Masten, J., in *Weyburn Townsite Co.* v. *Honsberger*, 43 O.L.R. 457, has been reversed by the Appellate Division on the ground that the contract in question was in fact made in Saskatchewan, and not in Ontario, as Masten, J., had found, yet the Chief Justice of Ontario, with whom the majority of the Court agreed, states that he agreed with the conclusion of

Masten, J., that the plaintiff company by its Provincial incorporation acquired a capacity to carry on its business beyond the limits of the Province of Saskatchewan where it was incorporated; and that the declaratory legislation of 1917 (which is in similar terms to the Ontario Provincial Act, 6 Geo. V, c. 36, s. 6), could not give validity to transactions entered into beyond the limits of the Province of Saskatchewan before the passing of the Act. The Appellate Division, however, does not express any opinion (nor was it necessary that they should) as to the question whether it is possible for a Provincial Legislature to give any company incorporated under the Provincial law a capacity to acquire extra-territorial powers *ab extra*. On this question, as we pointed out in a former article (*ante* vol. 54, p. 379) both Meredith, C.J.C.P., and Masten, J., have expressed opinions in the negative, and on the other hand Lennox, J., and Ferguson, J.A., have expressed opinions to the contrary. What is the true legal aspect of 6 Geo. V. c. 35, s. 6 and kindred enactments is therefore still a matter of doubt.

CONTRACT TO LEND MONEY.

Sherwood v. *Sheehy*, 15 O.W.N. 67, recently before the Divisional Court on appeal from the County Court of Peterborough was an action to recover damages for the alleged breach of a contract to lend money. The action failed because in the opinion of the Court the contract was to advance money as a building to be erected by the defendant on the mortgaged land should progress: and, as no building had been commenced, the Court held that there had been no breach. It may be useful to remember that a contract to lend money is not one that can be specifically enforced: *Western Wagon Co.* v. *West* (1892) 1 Ch. 271; 66 L.T. 402. The only remedy for breach of such contracts is by way of action for damages and if no actual damage is proved the damages are merely nominal: *South African Territories* v. *Wallington*, 76 L.T. 520; *Mennie* v. *Leitch*, 8 Ont. 397. If damages are recovered for the breach of such a contract, they are not so recovered by way of loan. The measure of damages in such cases is not to be based

on the inconvenience the plaintiff may suffer; but, is simply the difference in the rate of interest the plaintiff was to pay the defendant and the rate at which he could get the money elsewhere at the date of breach—see *per* Willes, J., *Fletcher* v. *Tayleur*, 17 C.B. 21.

CANADIAN BAR ASSOCIATION.

It was the hope of the promoters of this Association that it would exert a helpful influence in all matters connected with the administration of justice throughout the Dominion. We are glad to know that it has so proved its usefulness; but, for various reasons, only to a limited extent. It will make for the advancement of matters legal and judicial if its influence is felt in the future to a greater extent than in the past.

Our attention is drawn to this subject by reading a report of the action of the American Bar Association in connection with Court Martial law in the United States. Prominent members of the Association think that an investigation should be made to give better results and remedy injustice in the administration of the law referred to, and action has been taken toward such an investigation by the Association. It would appear also that this investigation is to have the co-operation and assistance of the army authorities.

The importance of this, so far as Canada is concerned, is that it draws attention to the influence which the Canadian Bar Association ought to have in public matters in which the administration of justice is in question. We are not concerned in Court Martial law, which is the matter at present under consideration in the United States; but we desire to strengthen the hands of those who are responsible for the conduct and development of our Association in connection with such matters as it has already taken up as part of its duties and responsibilities. In this connection we may mention the following subjects:—The general uniformity of laws throughout the Dominion, especially in reference to company law, testamentary provisions and the admin-

istration of estates, divorce, dower, real property and convey, ancing, devolution of estates, etc., and, not the least important the appointment of Judges.

In former days party politics had less to do with judicial matters than they have at present. In those days the Government felt the same responsibility and the same duty in the selection of the best men for Judges as does the Lord Chancellor of England in the Mother Country. There are of course difficulties in the way. One is the inadquacy of salaries allowed to Superior Court Judges. In the Province of Quebec Judges occupying positions much the same as County Court Judges in other Provinces are called Superior Court Judges; so that the Quebec leaders would expect their salaries to be increased because they are called Superior Court Judges, whereas their duties in the great majority of cases correspond more nearly to those who try Division Court cases. A proper equalization of salaries would be part of the duties of any committee or commission which might be appointed through the efforts of the Association whereon to found the necessary legislation.

It goes without saying that action in connection with such matters should receive the best attention of the best men of the Bar in Canada. Are they sufficiently patriotic, or sufficiently alive to the responsibilities which fall on them as leaders of the Bar to give the time and attention that would be necessary to produce results in the direction indicated?

It must be remembered that the men most prominent in the work of the American Law Association are leaders of the Bar in the various States where they reside. They are busy men whose time is very valuable; but they willingly give their time and talents in the service of the country. Their only reward is the esteem and admiration of their fellows in the profession, and the respect of all who are in a position to appreciate the value of their self-imposed labours.

ONTARIO BAR ASSOCIATION.

The Ontario Bar Association held its Thirteenth Annual Meeting at Convocation Hall, Osgoode Hall, Toronto, on Thursday and Friday, February 20th and 21st, 1919.*

Matters of far-reaching interest and importance were included in the agenda. The reports of officers and committees for the year 1918-1919 shewed the achievements of numerous useful measures of law reform at the instance of the Association with a residue of matters pending and not yet completed, which will engage the attention of the Council of the Association.

The retiring President, Mr. R. T. Harding, delivered a comprehensive address, referring to the achievements of the Association during the past year and containing particular reference to certain items, of which the following may be mentioned as of special interest both to the profession and to the general public:—

1. As to Soldiers' Memorial:—The erection of a fitting memorial at Osgoode Hall for the members of both Bench and Bar who have been killed in action in the Great European War we have already urged, and it has engaged the attention, both of the Benchers of the Law Society and of the Ontario Bar Association. It is in contemplation that the memorial will be of a character indicative so far as possible of the gigantic sacrifice which has been made by the members of the profession for the cause of liberty and justice, the maintenance of which has, within the past four years, involved loss of life, destruction of property and other losses and sufferings to a degree unprecedented in the world's history. It is expected that recommendations will be dealt with very shortly leading to the achievement of this object.

We notice that the Law Society of England at its last meeting took action of a similar character. The objects to be carried out being, (1) the erection of a Memorial in the Law Society's Hall; (2) the compilation of a record of service; and (3) the establishment of a relief fund for solicitors and articled clerks and the

*We are indebted for the matter of this excellent summary of the proceedings to Mr. A. A. Macdonald, the very efficient Recording Secretary of the Association.

families and dependents of those who have been killed. The whole scheme to be a national one.

It is pertinent to set out at this point the fact which was made public to the meeting that in the Province of Ontario nearly six hundred barristers, solicitors and students have been with the Colours, and the Military Service Act was responsible for less than three per cent. of that number.

2. Reforms and improvements in the administration of justice:—Suggestions along this line include the increased remuneration for Supreme Court Judges throughout the Province; abolition of the office of Junior County Court Judge, except in large centres; the designation of a Supreme Court Judge to sit permanently in Weekly Court so as to make for greater uniformity of practice; a central Criminal Court, at Toronto, to be presided over by a Judge of Supreme Court rank, to try all criminal cases; and specialization of cases so that each case might be tried by a Judge of special experience and training in the particular branch of law and practice involved in the case.

The above matters have been deliberated upon and interviews have been held with a view to these reforms being brought to pass, and it is the hope of the Association that some, or all of them, may be realized at an early date.

At the Friday morning session, Dr. John Hoskin, K.C., Treasurer of the Law Society of Upper Canada, addressed the meeting in a witty and impromptu speech that was well received.

Dr. Hoskin referred in particular and with great pride to his experience while Chairman of the Discipline Committee for over twenty years, during which time he discovered with surprise how few of the members of the Bar have strayed in their dealings with their clients or otherwise from the path of strict moral rectitude, "particularly," as the learned gentleman expressed it, "in view of all the rascality which some of their clients pour into their ears."

Hon. Mr. Justice Lennox addressed the meeting in the interests of the returned soldiers who are students or members of the profession, and spoke upon the desirability of vacation schools being held, with special lectures, for the benefit of those members of the profession, particularly, who, owing to long absence on

active service, have gotten out of touch with matters of practice and procedure, and have failed to keep abreast with the other changes in substantive law, without a full knowledge of which they could not with safety, either to themselves or to their clients, resume the practice of their profession. This is a matter for which there has finally, through the good offices of the Benchers of the Law Society, been adequate provision made; and, during the forthcoming summer, special lectures will be delivered at Osgoode Hall to meet this need.

Several other interesting addresses were also delivered. Hon. Mr. Justice Riddell read an instructive paper on the Judge in the Parliament of Upper Canada. Hon. Mr. Justice Craig, one of the Supreme Court Judges of the Yukon, read a paper, which was listened to with a great deal of interest, on the introduction of law in the Yukon. Mr. Henry R. Rathbone, counsellor-at-law of Chicago, Illinois, Mr. John Lord O'Brien, Assistant to the Attorney-General of the United States at Washington, and Captain Adolp Moilhut, a veteran of the famous 22nd Battalion, and who represented the Quebec Bar Association, were three of the special guests of the Association.

Mr. Rathbone delivered an eloquent address at the Friday afternoon session, when he told of the war work of the Chicago Bar Association, with particular reference to "The Draft Act," Where lawyers were needed, lawyers were sent to man the Exemption and Appeal Boards, and a resolution was passed by the Association making it absolutely impossible for a lawyer to make a single cent out of any of the war work he did. The Association was divided into four divisions. The first division provided assistance to the Federal Government in bringing to justice those engaged in enemy propaganda. The second division looked after the interests of those lawyers who had left their practices to go and fight, and the third division looked after their dependents. The fourth division supplied speakers from amongst the members of the Bar for all kinds of patriotic propaganda.

Another feature of Mr. Rathbone's most interesting address was the almost unqualified success which has attended the elective judiciary system. His remarks were such as to afford food for a

great deal of thought and possibly further action in regard to the filling of the ranks of the judiciary in this country in future generations.

Mr. O'Brien spoke of his experiences while in charge of the espionage cases, under the Departmnet of the Attorney-General of the United States, remarking that all cases were tried in open Court, as in peace time, and pointing out further that the entry of the United States into the war rendered necessary the passing of legislation, new in its entirety, for the protection of the country from the work of alien enemies, both within and without. The Internment Statute, which had been used first in the unsettled days of 1798, Mr. O'Brien said, was found to be of the utmost assistance. That statute had been used to some extent in the days of 1812, but had since been forgotten. The Germans had forgotten it, but, the day after the United States entered the war, the Germans, as well as the Americans, learned about it. Some seventy German spies disappearing in internment camps are to its credit.

Captain Adolp Moilhut, a Montreal lawyer, a veteran of the famous 22nd Battalion, mentioned that, out of the Bar of Montreal seventy members had enlisted. He also spoke with interest of various experiences at the Front, stating amongst other things that it was not generally known that it had been at the request of the mine-owners of France that the Canadians had been held at Passchendaele.

The annual meeting was brought to a close on the evening of Friday, February the 21st, with a large banquet at the King Edward Hotel, which was thoroughly enjoyed by all. It marked the beginning of a new international era for lawyers, and had a special charm by reason of the presence of some forty or fifty members of the Buffalo Bar Association.

The officers elected for the ensuing year were as follows:—Honorary president, Hon. N. W. Rowell, K.C., Toronto; president, N. B. Gash, K.C., Toronto; vice-presidents, Col. W. N. Ponton, K.C.; Belleville, Col. R. J. Maclennan, Toronto, J. H. Rodd, Windsor; treasurer, C. F. Ritchie, Toronto; recording secretary, A. A. Macdonald, Toronto; corresponding secretary, Z. Gallagher, Toronto; historian and archivist, W. S. Herrington, Napanee; executive committee (residing in Toronto), J. A. McAndrew, A. J. Russell Snow, K.C., J. H. Spence, Frank Denton,

K.C., Daniel Urquhart, W. K. Murphy, Gideon Grant; (out of town), F. D. Kerr, Peterbrough; J. S. Davis, Smithville, and W. S. Ormiston, Uxbridge.

CHANGE OF TIME.

The so-called "Daylight Saving" scheme has met with rather a rebuff owing to the opposition of the rural population. In cities and towns it met last year with general approval, and if the question had been left to them they would probably have given an unanimous vote in favour of the renewal of the Act, but the opposition of the farmers was so strong that the Government could not withstand the pressure. The result is, that while many cities and towns and the railways and banks have put on their clocks an hour, the farmers will be carrying on their business according to standard time. A certain amount of confusion in a variety of ways has arisen. One would imagine that the farmers must think that the passage of the proposed Act would compel all farmers to begin work an hour earlier than they wanted to do; whereas the Act would have no such effect; and if the farmers did not wish to get up an hour earlier, all they had to do was to arrange to get up an hour later than the nominal time, and from April to October get up, say, at six instead of at five.

It is surprising how people are led away by foolish clamour. We are no better in this respect than our forefathers, many of whom, when the change was made in 1752 from the old style to the new style, and as a necessary consequence eleven days were dropped from the calendar and September 2nd, 1752, was followed by September 14th, set up the cry "give us back our eleven days"! We heard of a farmer in a back township of Ontario who, when the Daylight Saving Act was first introduced, fiercely denounced Mr. Borden for assuming that he had power greater than the Almighty by passing a law affecting the rising of the sun! As we write there is an amusing and exasperating muddle in Courts and legal offices; Judges and officials at loggerheads; clocks being put on an hour, then back again, etc., and the world's spirit of unrest has invaded even the staid and dignified precincts of halls of justice.

REVIEW OF CURRENT ENGLISH CASES.

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BETTING — PLACE USED FOR BETTING — CLUB — BETS MADE BETWEEN MEMBERS ONLY—MEMBERS ACTING AS BOOK-MAKERS—"BETTING WITH PERSONS RESORTING THERETO—BETTING ACT, 1853 (16-19 VICT. C. 119) SS. 1, 3—(CR. CODE S. 227 AS AMENDED 1910 (D.), C. 10, S. 1).

Jackson v. *Roth* (1919) 1 K.B. 102. This was a case stated by a magistrate. The defendants were prosecuted for an offence against the Betting Act, 1853, ss. 1, 3 (see Cr. Code, s. 227, as amended by 1910 (D.), c. 10, s. 1). The facts were that the defendants were members of a social club in whose premises a place was set apart and used for the purpose of betting on horse races by members of the club with each other, and to the place in question the defendants had resorted and betted with each other. The club was a bona fide social club and non-members were not knowingly admitted thereto. The magistrate had held that no case had been made out by the prosecutor, but a Divisional Court (Darling and Avory, JJ.) held that as a soc al club and for social purposes the club was a legitimate place of meeting, but that it was illegitimately used for the purpose of betting, and in resorting thereto for the purpose of betting the defendants committed a breach of the Betting Act and should have been convicted, and the case was accordingly remitted to the magistrate.

COPYRIGHT — ASSIGNMENT — ASSIGNMENT OVER — ROYALTIES —LIABILITY OF SECOND ASSIGNEE—CHARGE—VENDOR'S LIEN.

Barker v. *Stickney* (1919) 1 K.B. 121. This was an appeal from the decision of McCardie, J. (1918) 2 K.B. 356, noted *ante* p. 25. The case was whether or not an assignee of a copyright, taking from an assignor who was under obligation to pay royalties, was also bound to pay the royalties, he having entered into no express obligation so to do. McCardie, J., held that he was not liable, and the Court of Appeal (Bankes, Warrington, and Scrutton, L.JJ.) have now affirmed his decision. The rules which McArdie, J., stated, as governing the question of the reservation of a vendor's lien, were not, however, approved.

MANDAMUS—PUBLIC AUTHORITIES PROTECTION ACT, 1893 (56 & 57 VICT. c. 61) s. 1—(R.S.O. c. 89, s. 13)—LIMITATION.

The King v. *Port of London* (1919) 1 K.B. 176. This case may be briefly noticed for the fact that the Court of Appeal (Bankes, Warrington, and Scrutton, L.JJ.) express a strong opinion, although they do not actually decide, that an application for a prerogative writ of mandamus is not within the six months' limitation prescribed by the *Public Authorities Protection Act*, s. 1 (R.S.O., c. 89, s. 13).

INSURANCE (MARINE)—PROFIT ON CHARTERPARTY—WAR RISKS—CAPTURE OF VESSEL—CONSTRUCTIVE TOTAL LOSS—SUBSEQUENT RECOVERY OF SHIP AND CARGO BY OWNERS—NOTICE OF ABANDONMENT.

Boura v. *Townend* (1919) 1 K.B. 189. This was an action on a policy of insurance on profit on charterparty. The vessel was chartered by the plaintiffs to carry a cargo of jute from Calcutta to Valencia in Spain. The plaintiffs valued their profit on the venture at £30,000, for which the policy in question was issued. The chartered vessel was to proceed from Delagoa Bay to Calcutta so as to arrive there the first week in December, 1917. She was not heard of after leaving Delagoa Bay on November 4, 1917, until February 27, 1918, when news arrived in England that the vessel was stranded on the coast of Denmark. It was then learnt that she had been captured in the Indian Ocean on her way to Calcutta on November 10, 1917, and a prize crew had been placed on board, and in the endeavour to take her to Germany she had been stranded. The policy was against total or constructive loss of steamer only from Delagoa Bay, via Colombo, to Calcutta and until sailed; and was against marine and war risks including capture by enemies of Great Britain, but excluding all claims arising from delay. And the plaintiff claimed as for a total constructive loss of the venture. No notice of constructive total loss was given to the defendants. Roche, J., who tried the action, held that the plaintiffs were entitled to recover: that the capture of the vessel constituted a total constructive loss, and that it was not necessary that notice should have been given. He held that the fact that the vessel was ultimately recovered did not enable the defendants to rely on the clause in the policy excluding all claims arising from delay. He accordingly gave judgment for the plaintiffs for the amount claimed with costs.

SALE OF GOODS—C.I.F. CONTRACT—PAYMENT ON PRODUCTION OF SHIPPING DOCUMENTS—LOSS OF GOODS BEFORE TENDER OF DOCUMENTS—KNOWLEDGE OF VENDORS—POLICY OF INSURANCE COVERING OTHER GOODS—VALIDITY OF TENDER—NON-COMPLIANCE WITH TERMS OF CONTRACT.

Manbre Saccharine Co. v. *Corn Products Co.* (1919) 1 K.B. 198. This was an action to recover damages for the breach of two c.i.f. contracts for the sale of goods, in which some nice points of law are discussed: (1) Can a buyer under a c.i.f. contract refuse to pay the contract price on tender of the necessary documents, because, prior to the tender, the goods have been lost to the knowledge of the vendor? McArdie, J., who tried the action, answers this question in the negative and holds that a contract of that description is virtually a contract to pay on tender of the documents. (2) It then became necessary to decide whether the tender of documents which had been made was sufficient: and as it appeared that the insurance effected by the seller did not cover solely the goods in question but also other goods in which the buyers were not interested, the learned Judge held that this was not a sufficient compliance with the contract. (3) There was still a further point, the contract was for starch in 280 lbs. bags. The goods shipped were in 220 lbs. and 140 lbs. bags; and it was held that this also was not a compliance with the contract. Judgment was therefore given in favour of the plaintiffs.

MASTER AND SERVANT — CONTRACT OF SERVICE — SERVANT AUTHORIZED TO RECEIVE "TIPS"—WRONGFUL DISMISSAL—MEASURE OF DAMAGES.

Manubens v. *Leon* (1919) 1 K.B. 208. This was an action by a servant to recover damages for a wrongful dismissal. By the terms of the contract the plaintiff was to receive 30s. per week wages and to be authorized also to receive "tips" from plaintiff's customers, which had amounted to 30s. per week. The plaintiff was wrongfully dismissed. The defendant paid into Court a week's wages in lieu of notice, but the plaintiff also claimed an allowance in respect of the loss of "tips." This the County Court Judge disallowed, but a Divisional Court (Lush and Bailhache, JJ.) held that the plaintiff was entitled to an additional 5s. in respect of the loss of "tips."

MASTER AND SERVANT—MONTH'S NOTICE BY SERVANT—WRONGFUL DISMISSAL DURING CURRENCY OF NOTICE—MEASURE OF DAMAGES—LOSS OF BOARD AND LODGING.

Lindsay v. *Queen's Hotel Co.* (1919) 1 K.B. 212. This also was an action by a servant to recover damages for wrongful dismissal. In this case the servant had given a month's notice of leaving. But six days before the month had expired the defendants wrongfully dismissed her. The County Court Judge allowed the plaintiff wages up to the time she would have left, and also an extra month's wages for dismissal without notice. On appeal by the defendants a Divisional Court held that although a master is entitled to dismiss a servant without notice on payment of a month's wages, that that was not the measure of damages in this case, but that it was merely the actual loss which the plaintiff had suffered, which the Court held was simply her wages for the six days and also an allowance for board and lodging for that period.

RAILWAY — TRAVELLING WITHOUT PAYING FARE — INTENT TO AVOID PAYMENT OF FARE—PURCHASE OF NON-TRANSFERABLE TICKET FROM ANOTHER PASSENGER—(R.S.C., c. 37, s. 281).

Reynolds v. *Beasley* (1919) 1 K.B. 215. This was a case stated by a magistrate. The defendant was summoned for breach of the Regulation of Railways Act, 1889, which provides that if any person travels or attempts to travel on a railway without having paid his fare, and with intent to avoid payment thereof . . . he shall be liable on conviction to a fine. The defendant had purchased a non-transferable ticket from another passenger which he tendered to the collector. The Justices were of opinion that no intention to avoid payment of fare had been disclosed; but a Divisional Court (Darling, Coleridge and Shearman, JJ.) held that the defendant had no right to travel on the non-transferable ticket, and was guilty of a breach of the Act. See R.S.C., c. 37, s. 281.

MEDICAL MAN — MEDICAL ASSOCIATION — INTERFERENCE BY ASSOCIATION WITH PRACTICE OF A PROFESSION—UNLAWFUL MEANS — THREATS—BOYCOTT—DEFAMATION—CORPORATION —MALICE—RESTRAINT OF TRADE.

Pratt v. *British Medical Association* (1919) 1 K.B. 244. This was an important case and one deserving of careful consideration.

The plaintiffs were medical men and had accepted appointments in the Coventry Provident Dispensary, an association formed for securing medical attendance for its members and their families. The members paid an annual fee of 4s., and the income of the Dispensary was about £4,000, one-half of which was expended in drugs, and payment of skilled dispensers, and the balance in payment of doctors on the medical staff. The Medical Association was an association of doctors having branches in Coventry and elsewhere. The members in Coventry appear to have conceived that there was something unprofessional on the part of the plaintiffs in being connected with the Dispensary, and with a view to compel them to disassociate themselves therefrom, the Medical Association published defamatory statements concerning the plaintiffs and caused them to be boycotted by the other members of the profession in Coventry and elsewhere. The action was brought to recover damages for conspiracy, slander and libel. The defendants did not offer any justification or defence of their defamatory statements, but the Medical Association asserted a legal right to boycott the plaintiffs and accepted responsibility for the acts of the various divisions of the Association concerned in the boycott and for threats of its officials and agents. McArdie, J., who tried the action, in a very elaborate judgment discussed the rights of the parties, and came to the conclusion, that there being no substantial ground for saying that the acts of the plaintiffs were unprofessional or contrary to the honour of the profession, the conduct of the Medical Association and its various divisions and officials was wholly unwarranted and an unlawful interference with the plaintiffs in the practice of their profession, and he gave a judgment for very substantial sums in favour of the respective plaintiffs.

SHIP REQUISITIONED BY ADMIRALTY — SALVAGE SERVICES PERFORMED BY VESSEL REQUISITIONED—RIGHT TO SALVAGE—"SHIP BELONGING TO HIS MAJESTY"—MERCHANT SHIPPING ACT, 1894 (57-58 VICT. C. 60), S. 557—MERCHANT SHIPPING ACT, 1916 (6-7 GEO. 5, C. 41), S. 1.

Admiralty Commissioners v. *Page* (1919) 1 K.B. 299. This was an appeal from the decision of Bailhache, J. (1918) 2 K.B. 447 (noted *ante* p. 27), and the Court of Appeal (Eady, M.R., and Duke, J.A., and Eve, J.) have affirmed the judgment.

Reports and Notes of Cases.

Province of British Columbia.

COURT OF APPEAL.

BROWN'S TRAVELLING BUREAU v. TAYLOR.

Macdonald, C.J.A., Martin, McPhilips, J.J.A.] [44 D.L.R. 204.

Insurance—Undertaking to have policy ready at a certain time—Agent staying hand of company—Policy not ready—Liability for premium.

An insurance agent who undertakes to have an insurance policy ready at a certain date, and, by an unauthorized departure from the terms of the application, stays the hand of the insurance company so that the contract is not concluded or the policy issued until after the date agreed upon, cannot recover the insurance premium from the insured.

Sir Charles H. Tupper, K.C., for appellant. *Martin*, K.C., for respondent.

ANNOTATION TAKEN FROM 44 D.L.R.

What is the Exact Moment of the Inception of a Contract of Insurance

By F. J. LAVERTY, K.C., Montreal. Author of "*Insurance Law of Canada.*"

This judgment appears to be based partly on the issue of fact as to what was the agreement between the parties, and partly on the finding in law that the policy did not cover the respondent when he went aboard his ship at Montreal on the 2nd June.

The question of the exact moment of the inception of a contract of insurance has given rise to a number of important decisions; the latest is that of the House of Lords in 1916, *Allis-Chalmers Co.* v. *Fidelity & Deposit Co. of Maryland*, 114 L.T.R. 433. Plaintiffs had requested a bond guaranteeing them against loss through the dishonesty of their Paris manager to be in force "from issuance"; in terms the bond recited that it covered plaintiffs from March 8, 1912, to March 7, 1913; it was executed on March 8, and immediately tendered to plaintiffs, but as their manager was absent, it was arranged to stand over to his return, which occurred on April 18, on which date he paid the premium. The Paris manager had disappeared on April 13, and by the 18th plaintiffs suspected that he might have absconded. They later claimed for defalcations occurring before April 18, but their action was dismissed on the grounds that they had concealed material facts, and that the contract was not completed until April 18.

Loreburn, L.J., found that the parties had never been *ad idem* on the subject of the exact premium to be paid, and there was no evidence that the other terms of the policy were ever agreed to by the insured, or that he had ever agreed to take the usual form, whatsoever it might be.

The Supreme Court of Canada dealt with a similar question in *Donovan* v. *Excelsior Life Insurance Co.* (1916), 31 D.L.R. 113, 53 Can. S.C.R. 539, and held that there was not a completed contract of insurance between the company and the insured at the time of his death, inasmuch as the condition in the policy as to its delivery and surrender of the receipt during the lifetime and continued good health of the insured was not complied with. In this case the application stated the insured's age as 64, and the doctor's report as 65; the premium was paid and the policy written on the basis of the age being 64, and it was sent to the agent with instructions to reconcile the discrepancy. He ascertained that the age should have been 65 and obtained from insured the additional premium; a new policy was prepared and sent to the agent, who did not deliver it on learning that the insured was ill; she died a few days later.

The court distinguished *North American Life Insurance Co.* v. *Elson* (1903), 33 Can. S.C.R. 383, on the ground that in the *Donovan* case, the policy was sent to the company's agent not for unconditional delivery as in the *Elson* case, but to be delivered only upon the conditions stated in the letter from the company to their agent referring to it.

The facts of the *Elson* case were that the policy provided that it would not be in force until the first premium had been paid and accepted and the receipt delivered; the policy purported to be signed on September 27, 1894, and to cover insured until October 5, 1895; it was sent to the company's agent at Winnipeg on September 27, and forwarded by him to the insured, who received it on October 7; he died on September 30, 1897; it was held that the contract of insurance was completed on September 27, 1894, and that it had been in force 3 full years when insured died.

In the United States we find a case of *McMaster* v. *New York Life Ins. Co.*, (1901) 183 U.S.R. 25, in which the Circuit Court of Appeals held that the policy was not in force till the date of its execution, December 18, 1893, although it recited that the annual premium was to be paid on December 12 in each succeeding year; it was delivered and the first premium paid on December 26, 1893, and it was held to be still in force on the date of the death of the insured on December 18, 1894.

In the *Donovan* case the Supreme Court also distinguished the ruling in *Roberts* v. *Security Co.*, [1897] 1 Q.B. 111, where the policy recited that the premium had been paid, and that no insurance would be held to be effected until such payment; it was sealed with the seal of the company and signed by two directors and the secretary and remained in its possession. A loss occurred before payment of the premium, which in fact never was paid; it was held that there was a concluded agreement, and that the company had waived the condition as to payment of the premium.

The House of Lords in *Xenos* v. *Wickham* (1867), L.R. 2 H.L. 296, dealt with a case where a broker had submitted a slip for marine insurance, and the insurer prepared a policy in accordance; it was tendered to the broker,

one of whose clerks returned it, and had it cancelled, stating that there had been a mistake. The ship being lost, the owner succeeded in recovering on the policy, on the ground that he had never authorized the broker to cance the insurance; that a policy executed by an insurer is complete and binding against him, although in fact it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it, and that it is not necessary that the insured should formally accept or take away a policy, in order to make the delivery complete.

McPhillips, J.A. (in *Brown's Travel Bureau* v. *Taylor, supra*), refers to a judgment of the Privy Council, *Re Equitable Fire & Accident Office* v. *Ching Wo Hong*, [1907] A.C. 96, where the policy under consideration also contained a condition that it was to be of no effect unless the premium had been wholly or partially paid; the fact that no payment had been made was held to have prevented it from ever coming into force.

It is apparent that no hard and fast rule can be laid down to determine the moment when any particular policy may come into effect, this being a point to be decided according to the facts of the case and the wording of the instrument.

Province of Ontario

SUPREME COURT.

SCOTT v. CRINNIAN.

Falconbridge, C.J.K.B.] [44 D.L.R. 24.

Vendor and purchaser—"Mortgage"—Definition of under Mortgages Act—Vendor's lien—Insurance money—Application.

The definition of "mortgage" in the Mortgages Act, R.S.O. c. 112, is wide enough to cover the charge known as a vendor's lien and the holders of such vendor's lien are entitled as mortgagees to have insurance money on the property applied in accordance with the provisions of s. 6 of that Act. Although they are entitled to the security of the insurance money, they are not entitled to apply the insurance money in payment of purchase instalments not yet due, but such moneys should be held in trust or invested or paid into court if the parties cannot agree as to its disposal.

Corham v. *Kingston* (1889), 17 O.R. 432; *Edmonds* v. *Hamilton Provident* (1881), 18 A.R. (Ont.) 347, followed.

Sir George Gibbons, K.C., for plaintiffs. *T. G. Meredith*, for defendant.

ANNOTATION TAKEN FROM 44 D.L.R.

INSURANCE ON MORTGAGED PROPERTY.

BY JOHN DELATRE FALCONBRIDGE, M.A., LL.B.

1. Insurable interest.
2. Right or obligation to insure.
3. Insurance in the name of the mortgagor.
4. Mortgage clause in insurance policy
5. Insurance in the name of the mortgagee.
6. Application of insurance money.

1. Insurable interest.

The mortgagor has by virtue of his equity of redemption an insurable interest in the mortgaged property, and his right to insure is co-extensive with the value of the property (*a*), but if he makes an absolute transfer of his equity of redemption he no longer has an insurable interest, and any insurance then existing in his favour ceases to be effectual unless it be assigned with the consent of the insurers to the transferee of the equity of redemption. The mortgagor's insurable interest does not cease until the mortgage debt has been paid, even although the mortgage has been foreclosed, for the mortgagor may nevertheless continue to be liable for the mortgage debt (*b*).

By a condition in a policy of insurance against fire the policy was to become void "if the assured is not the sole and unconditional owner of the property . . . or if the interest of the assured in the property whether as owner, trustee . . . mortgagee, lessee or otherwise is not truly stated." It was held that a mortgagor was sole and unconditional owner within the terms of said condition. By another condition the policy was to be avoided if the assured should have or obtain other insurance, whether valid or not, on the property. The assured applied for other insurance, but before being notified of the acceptance of his application the premises were destroyed by fire. It was held that there was no breach of said condition (*c*).

A mortgagor who had made a mortgage, under the Short Forms of Mortgages Act, containing a covenant to insure the mortgaged premises against fire, effected an insurance thereon with the defendant company, the loss, by the policy, being payable to the plaintiff, the mortgagee, as his interest might appear under the mortgage. Subsequently the mortgagor conveyed his equity of redemption to the mortgagee without the consent of the company having been obtained therefor. The premises having been afterwards destroyed by fire, it was held that the plaintiff was not entitled to the insurance moneys, for (1) the fact of the conveyance made by the mortgagor to the plaintiff, whereby the former ceased to have any interest at the time of the fire, was a good answer to the claim; and (2) such conveyance constituted a breach of

(*a*) *Glover* v. *Black*, 1763, 1 Wm. Bl. 396; 3 Burr. 1394 97 E.R. 891.
(*b*) *Parsons* v. *Queen Insurance Co.*, 1878, 29 U.C.C.P. 188, at p. 211; appeal to Privy Council on another point, 7 App. Cas. 96.
(*c*) *Western Assurance Co.* v. *Temple*, 1901, 31 Can. S.C.R. 373, following *Commercial Union Assurance Co.* v. *Temple*, 1898, 29 Can. S.C.R. 206.

a statutory condition which provides against the insured premises being assigned without the company's consent (*d*).

In order to come within a condition providing against the assignment of the insured premises, an assignment must be an absolute transfer of the subject matter. An assignment by way of mortgage (*e*) or an agreement to sell, the vendor retaining the legal estate (*f*), does not constitute a breach of the condition.

A mortgagee, unpaid vendor or other person having a limited interest in property, may effect insurance either (1) on his own interest merely, or (2) on his own interest as well as the interests of all other persons in the property. For instance, a mortgagee may effect insurance either (1) on his own interest as mortgagee or (2) on the property as a whole, including the equity of redemption (*g*).

It has been held in New Brunswick that the interest of the mortgagee as such ends on foreclosure absolute, and that if a loss occurs thereafter the mortgagee cannot recover on a policy issued to him as mortgagee (*h*).

2. Right or obligation to insure.

It is usual in Ontario to insert in a mortgage the short form of covenant provided by the Short Forms of Mortgages Act (*i*), as follows:—

> And that the said mortgagor will insure the buildings on the said lands to the amount of not less than of lawful money of Canada.

In the case of a mortgage expressed to be made in pursuance of the statute, the foregoing covenant has the same effect as if it were in the following terms (*j*):—

> And also that the said mortgagor or his heirs, executors, administrators or assigns shall and will forthwith insure unless already insured and during the continuance of this security keep insured against loss or damage by fire, in such proportions upon each building as may be required by the said mortgagee his heirs, executors, administrators or assigns, the messuages and buildings erected on the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, in the sum of of lawful money of Canada, at the least, in some insurance office to be approved of by the said mortgagee, his heirs, executors, administrators or assigns, and pay all premiums and sums of money necessary for such purpose, as the same shall become due, and will on demand assign, transfer and deliver over unto the said mortgagee, his heirs, executors, administrators or assigns the policy or policies of insurance, receipt or receipts thereto appertaining; and if the said mortgagee, his heirs, executors, administrators or assigns, shall pay any

(*d*) *Pinkey* v. *Mercantile Fire Insurance Co.*, 1901, 2 O.L.R. 296.
(*e*) *Sands* v. *Standard Insurance Co.*, 1879, 26 Gr. 113, 27 Gr. 167; *Sovereign Fire Insurance Co.* v. *Peters*, 1885, 12 Can. S.C.R. 33.
(*f*) *Keefer* v. *Phœnix Insurance Co.*, 1901, 31 Can. S.C.R. 144; *Trotter and Douglas* v. *Calgary Fire Insurance Co.*, 1910, 3 A.L.R. 12.
(*g*) *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380, at p. 398; *Keefer* v. *Phœnix Insurance Co.*, 1901, 31 Can. S.C.R. 144, at pp. 148, 149. As to insurance of limited interests, see an article by William Harvey in 10 L.Q.R. 48 (Jan., 1894). As to insurance in the name of the mortgagee, see § 5, *infra*.
(*h*) *Gaskin* v. *Phœnix Insurance Co.*, 1866, 11 N.B. R. (6 Allen) 249.
(*i*) R.S.O. 1914, c. 117, schedule B, clause 12.
(*j*) R.S.O. 1914, c. 117, s. 3.

premiums or sums of money for insurance of the said premises or any part thereof, the amount of such payment shall be added to the debt hereby secured, and shall bear interest at the same rate from the time of such payments and shall be payable at the time appointed for the then next ensuing payment of interest on the said debt.

Under the Mortgages Act, R.S.O. 1914, c. 112, in the case of a mortgage which contains no power to insure and no declaration excluding the application of Part II. of the statute, there is a power to insure as therein provided (*k*).

In England it is provided by the Conveyancing Act, 1881, ss. 19 and 23, as follows:—

19—(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

. . . . . .

(ii) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money.

23—(1) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act, shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two-third parts of the amount that would be required, in case of total destruction, to restore the property insured.

(2) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):

(i) Where there is a declaration in the mortgage deed that no insurance is required;

(ii) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed;

(iii) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorized to insure.

(3) [*This sub-section relates to the application of the insurance money* (*l*).]

If a mortgage company through its manager undertakes with the mortgagor to keep alive an insurance on the mortgaged property, and takes steps towards carrying out such undertaking, but fails to carry it out, it is guilty of such negligence as to render it liable in damages to the mortgagor, if he is ignorant of such failure, for the amount of such insurance in case the property is burned after the policy lapses (*m*).

(*k*) R.S.O. 1914, c. 112, ss. 19, 26.
(*l*) Sub-s. 3 is similar in terms to s. 6 of the Mortgages Act, discussed in § 6, *infra*.
(*m*) *Campbell* v. *Canadian Co-operative Investment Co.*, 1906, 16 M.R. 464, following *Skelton* v. *London and North Western Ry. Co.*, 1867, L.R. 2 C.P. 631, at p. 636.

3. Insurance in the name of the mortgagor.

Usually, when mortgaged property is insured, the insurance is effected in the name of the mortgagor, and a clause is inserted in the policy that the loss, if any, shall be payable to the mortgagee as his interest may appear. Under such a clause, it would seem that the mortgagee could give a good discharge for money paid to him only to the extent of his claim as mortgagee, and that as to any surplus the receipt of the mortgagor would be necessary, whereas if the words "as his interest may appear" are omitted, the mortgagee could give a good discharge as to the whole sum paid (*n*). In any case the mortgagee has an equitable lien upon the policy and its proceeds. (*o*)

Notwithstanding the insertion of the clause mentioned, the mortgagor is the person assured and may sue in his own name upon the policy (*p*). Furthermore, apart from a provision in the policy to the contrary (*q*), a subsequent breach by the mortgagor of any of the conditions of the policy, as, for instance, of a condition avoiding the policy in the event of the assignment of the property without the consent of the insurer, will avoid the policy as against both mortgagor and mortgagee (*r*).

Whether, in the case of a policy purporting to insure the mortgagor and containing a clause that the loss if any shall be payable to the mortgagee as his interest may appear, the mortgagee may sue in his own name without joining the mortgagor is a question which has been much discussed. The weight of authority in Ontario is in favour of the view that the mortgagee may maintain the action. As against the objection that the contract is between the insurer and the mortgagor and that the mortgagee being a stranger to the contract is not entitled to sue upon it, the clause in question being a mere direction and authority to the insurer to pay the mortgagee instead of the mortgagor (*s*), it has been held that the effect of the issue of the policy to the mortgagor with the loss, if any, payable to the mortgagee as his interest may appear is to create the relation of trustee and *cestui que trust* between the mortgagor and the mortgagee. The subject of the trust is the right to receive the money payable under the policy and to sue for it, and this right may be exercised by the mortgagee in his capacity as *cestui que trust*, at least to the extent of his interest (*t*). In some of the cases where the policies were not under seal, emphasis was laid on this fact, but it would seem that the absence of a seal would not assist a third party in an action upon a contract to which he was not a party, and that the presence of a seal would not disentitle the third party from suing if the effect of the contract was to constitute him a *cestui que trust* (*u*).

(*n*) *Mitchell* v. *City of London Assurance Co.*, 1888, 15 O.A.R. 262, at p. 279.

(*o*) *Chev. Trwaders Bank of Canada*, 1909, 19 O.L.R. 74.

(*p*) *Caldwell* v. *Stadacona Fire and Life Insurance Co.*, 1883, 11 Can. S.C.R. 212; *cf. McQueen* v. *Phœnix Mutual Fire Insurance Co.*, 1880, 4 Can. S.C.R. 660.

(*q*) As to the effect of a "mortgage clause" in a policy, see § 4, *infra*.

(*r*) *Livingstone* v. *Western Assurance Co.*, 1868, 14 Gr. 461, 16 Gr. 9; *Chisholm* v. *Provincial Insurance Co.*, 1869, 20 U.C.C.P. 11; *Mitchell* v. *City of London Assurance Co.*, 1888, 15. A.R (Ont.) 262; *Haslem* v. *Equity Fire Insurance Co.*, 1904, 8 O.L.R. 246.

(*s*) See *Mitchell* v. *City of London Assurance Co.*, 1888, 15 A.R. (Ont.) 262, at p. 274.

(*t*) *Mitchell* v. *City of London Assurance Co.*, 1888, 15 A.R. (Ont.) 262, where the earlier authorities are discussed; *Haslem* v. *Equity Fire Insurance Co.*, 1904, 8 O.L.R. 246; *Laidlaw* v. *Hartford Fire Insurance Co*, 1916, 10 A.L.R. 7, 29 D.L.R. 229.

(*u*) *Mitchell* v. *City of London Assurance Co.* was followed in *Agricultural Savings and Loan Co.* v. *Liverpool, etc., Insurance Co.*, 1901, 3 O.L.R. 127, reversed, without any decision as to the right of the mortgagee to sue in his own name, 33 Can. S.C.R. 94. It is pointed out in 3 O.L.R. at p. 136, that the policy though by deed was not a deed *inter partes* but a deed poll upon which anyone named in it might sue. In this case there was also a "mortgage clause," as to which, see § 4, *infra*.

In a Nova Scotia case a policy not under seal contained the following provision: "Loss, if any, payable to the order of Peter Brush, if claimed within sixty days after proof, his interest therein being as mortgagee," and it appearing that the policy was obtained by the mortgagor in pursuance of a covenant entered into by him with Brush, that he should insure in the name and for the benefit of Brush, it was held that the mortgagee was entitled to sue on the policy in his own name (*v*).

In England it has been held that a covenant on the part of the mortgagor to insure, nothing being said as to the application of the insurance money, does not confer upon the mortgagee any right to the money in the event of the bankruptcy of the mortgagor (*w*), but in Ontario it has been held that a covenant to insure in the form provided by the Short Forms of Mortgages Act (*x*) operates as an equitable assignment of the insurance when effected (*y*). If there is neither a covenant to insure nor a provision that the money in case of loss shall be payable to the mortgagee, the mortgagee has no claim to money arising from insurance effected by the mortgagor (*z*).

Where an owner of property effects insurance thereon and subsequently mortgages the property, assigning the policy to the mortgagee, the insurance company cannot by arrangement with the mortgagee without the knowledge or consent of the mortgagor cancel the insurance. The mortgagor notwithstanding the assignment continues to be the person assured within the meaning of the Insurance Act, and the policy cannot be cancelled unless notice in writing is served upon the assured and the unearned portion of the premium is paid to him as required by the statute (*a*).

Where the mortgagor and the mortgagee effect separate insurances on their respective interests with different companies, and the mortgagee upon a loss occurring settles the amount of the loss with the company insuring him, this, even although the mortgagor may assent to such settlement, is not an estoppel against the mortgagor in favour of the other insurance company and the mortgagor may nevertheless claim payment under his policy (*b*).

A statutory condition (in Ontario) provides that if the property insured is assigned without the written permission of the company the policy shall thereby become void. This, however, applies only to an assignment of the property and not to an assignment of the policy unaccompanied by a transfer of ownership of the property (*c*).

If mortgaged property is insured in the name of the mortgagor, with loss, if any, payable to the mortgagee as his interest may appear, and a loss occurs, the surplus insurance money, after payment of the mortgagee's claim, belongs to the mortgagor by virtue of his contract with the insurer, and not by virtue of any obligation of the mortgagee to account in equity to the mortgagor. It follows therefore that the mortgagee is not entitled to invoke the doctrine

(*v*) *Brush* v. *Ætna Insurance Co.*, 1864, 1 Old. (N.S.) 459.
(*w*) *Lees* v. *Whiteley*, 1866, L.R. 2 Eq. 143.
(*x*) See § 2, *supra*.
(*y*) *Greet* v. *Citizens Insurance Co.*, 1880, 5 A.R. (Ont.) 596, affirming 27 Gr. 121; *Goldie* v. *Bank of Hamilton*, 1900, 27 A.R. (Ont.) 619.
(*z*) *Miller* v. *Tew*, 1909, 20 O.L.R. 77, at pp. 90, 91.
(*a*) *Morrow* v. *Lancashire Insurance Co.*, 1899, 26 A.R. (Ont.) 173.
(*b*) *Prittie* v. *Connecticut Fire Co.* 1896, 23 A.R. (Ont.) 449.
(*c*) *McPhillips* v. *London Mutual Fire Ins. Co.*, 1896, 23 A.R. (Ont.) 524.

of consolidation of mortgages so as to enable him to apply the surplus on account of an overdue mortgage held by him upon other property (*d*).

4. Mortgage clause in insurance policy.

In the case of insurance effected by a mortgagor upon mortgaged property it is now a common practice in Canada to insert in or attach to the policy a so-called "mortgage clause," safeguarding the mortgagee against the danger of the policy being avoided by the act or neglect of the mortgagor, and conferring upon the insurer the right to be subrogated (*e*) to the rights and securities of the mortgagee in the event of the insurance company claiming that the policy is avoided as against the mortgagor.

The form of mortgage clause adopted by The Canadian Fire Underwriters' Association is as follows:—

> Policy No. . . . It is hereby provided and agreed that this insurance, as to the interest of the mortgagees only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.
>
> It is further provided and agreed that the mortgagees shall at once notify said company of non-occupation or vacancy for over thirty days, or of any change of ownership or increased hazard that shall come to their knowledge; and that every increase of hazard, not permitted by the policy to the mortgagor or owner, shall be paid by the mortgagees on reasonable demand from the date such hazard existed, according to the established scale of rates, for the use of such increased hazard during the continuance of this insurance.
>
> It is also further provided and agreed that whenever the company shall pay the mortgagees any sum for loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor existed, it shall at once be legally subrogated to all rights of the mortgagees under all the securities held as collateral to the mortgage debt, to the extent of such payment, or, at its option, the company may pay to the mortgagees the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage, and all other securities held as collateral to the mortgage debt, but no such subrogation shall impair the rights of the mortgagees to recover the full amount of their claim.
>
> It is also further provided and agreed that in the event of the said property being further insured with this or any other office, on behalf of the owner or mortgagees, the company, except such other insurance when made by the mortgagor or owner shall prove invalid, shall only be liable for a ratable proportion of any loss or damage sustained.
>
> At the request of the assured, the loss, if any, under this policy is hereby made payable to ——— as —— interest may appear, subject to the conditions of the above mortgage clause.

Mortgagees applied for a policy of insurance to be issued in the name of

(*d*) *Re Union Assurance Co.*, 1893, 23 O.R. 627.
(*e*) As to the right of subrogation, see also § 5, *infra*.

the mortgagor. The policy was so issued in the name of the mortgagor, loss, if any, payable to the mortgagees, and subject to a mortgage clause. The premiums were paid by the mortgagor. A fire occurred and the insurance company paid the mortgagees the amount of the policy. The mortgagor claimed to have the mortgage discharged as being satisfied by the insurance money; the insurance company claimed that the mortgagor for certain reasons had forfeited any claim under the policy, that notwithstanding that no liability existed on its part to the mortgagor it had paid the insurance money to the mortgagees upon the condition that it should be subrogated to the rights of the mortgagees as provided by the mortgage clause, and that it was entitled to an assignment of the mortgage. It was held that as the insurance company had failed to shew any good defence as against the mortgagor, it was not entitled to repayment of the money or to be subrogated to the rights of the mortgagee, and that the insurance effected by the mortgagee, was effected for the benefit of the mortgagor, the payment consequently enuring to the benefit of the latter (*f*). In other words, the insurance company's right of subrogation depends upon the validity of its defence as against the mortgagor.

An insurer entitled to subrogation may recover from the assured not only the amount of any compensation or the value of any benefit received by the assured in excess of his actual loss, but also the full value of any rights or remedies against third persons which have been renounced by the assured and to which, but for such renunciation, the insurer would have been entitled to be subrogated (*g*).

The mortgage clause does not effect a new insurance in favour of the mortgagee. The insurer thereby agrees with the mortgagee that to the extent of his interest the insurance will not be invalidated by future act or negligence of the mortgagor, but the insurer is not debarred from setting up that the insurance was procured by fraud and therefore void *ab initio* (*h*).

It has been said that the mortgage clause constitutes a contract between the insurance company and the mortgagee, and that consequently the mortgagee's right to sue upon the policy without joining the mortgagor does not rest solely upon the clause providing that the loss, if any, shall be payable to the mortgagee as his interest may appear (*i*). The case in which this opinion was expressed was reversed on appeal on the ground that in any event the mortgage clause did not protect the mortgagee against the consequence of misstatements made by the mortgagor in the application for the insurance. Such misstatements rendered the original insurance void, and a subsequent renewal by way of renewal receipt was likewise a nullity (*j*).

5. Insurance in the name of the mortgagee.

A mortgagee, unpaid vendor or other person having a limited interest in

(*f*) *Bull* v. *North British Canadian Investment Co.*, 1888, 15 A.R. (Ont.) 421, affirmed, 1889, 18 Can. S.C.R. 697, Cameron, S.C. Cas. 1. In the Supreme Court of Canada Taschereau and Gwynne, JJ., expressed the opinion that the interest of the mortgagees was the same as if they were assignees of a policy effected with the mortgagor.

(*g*) *West of England Fire Insurance Co.* v. *Isaacs*, [1897] 1 Q.B. 226.

(*h*) *Omnium Securities Co.* v. *Canada Fire and Mutual Insurance Co.*, 1882, 1 O.R. 494.

(*i*) *Agricultural Savings and Loan Co.* v. *Liverpool, etc., Insurance Co.*, 1901, 3 O.L.R. 127, at p. 141. See § 3, *supra*, as to the effect of the last mentioned clause.

(*j*) *Liverpool and London and Globe Insurance Co.* v. *Agricultural, etc., Co.*, 1903, 33 Can. S.C.R. 94.

property may effect insurance either (1) on his own interest merely, or (2) on his own interest as well as the interests of all other persons in the property. For instance, a mortgagee may effect insurance either (1) on his interest as mortgagee, or (2) on the property as a whole, including the equity of redemption. In order that the insurance effected by a mortgagee should cover the property as a whole (*a*) the mortgagee must have intended to insure the interest of the mortgagor as well as his own, and (*b*) the policy must not by its terms be limited to the mortgagee's interest in the property. *Primâ facie* the insurance is intended to cover the property as a whole, but the amount of the premium may make it clear that the risk is more limited. If only the mortgagee's interest is insured, the mortgagee is entitled to receive only the amount to which he is damnified, whereas if the property as a whole is insured, he is entitled to receive the whole amount of the damage to the property to the extent of the insurance, holding the surplus over and above his own loss for the mortgagor (*k*).

If a mortgagee insures the mortgaged property out of his own funds without having any right under the mortgage deed or otherwise to recover the premium from the mortgagor, the insurance is for the benefit of the mortgagee alone, and in the event of loss he is entitled to receive the amount of the policy without giving credit therefor upon the mortgage (*l*), that is, he may hold the money as security for payment of the mortgage debt (*m*)

A contract of fire insurance, like a contract of marine insurance, is a contract of indemnity, and of indemnity only, and the assured, in case of a loss against which the policy has been made is entitled to be fully indemnified but is never entitled to be more than fully indemnified. One of the doctrines adopted in favour of the insurer in order to prevent the assured from recovering more than a full indemnity is the doctrine of subrogation. If an unpaid vendor or a mortgagee insures his interest in property and upon a loss occurring receives the insurance money, and if he afterwards receives the purchase price or the mortgage money, as the case may be, without deduction on account of the insurance, he is liable to the isurer for an amount equa l to the insurance money received by him, becausnhe is not entitled to be more than fully indemnified (*n*).

So, if a mortgagee, after the occurrence of damage insured against, is paid by the mortgagor, the mortgagee is not entitled to recover from the insurer upon a policy covering his interest only, because he has not been damnified. If, on the other hand, the mortgagee obtains payment of the whole amount of the mortgage debt from the insurer, the insurer is entitled to be subrogated to the rights of the mortgagee and is entitled to a transfer of the mortgagee's securities (*o*). There can, however, be no right of subrogation unless the mortgagee's claim is wholly satisfied (*p*).

(*k*) *Keefer* v. *Phœnix Insurance Co.*, 1901, 31 Can S.C.R. 144, at pp 148, 149, quoting from *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380, at p. 398, and *Insurance Co.* v. *Updegraff*, 1853, 21 Penn. 513, at p. 520.

(*l*) *Russell* v. *Robertson*, 1859, 1 U.C. Chy. Ch. 72; *Dobson* v. *Land*, 1850, 8 Hare 216; *King* v. *State Mutual Fire Insurance Co*, 1851, 61 Mass. 1.

(*m*) See also § 6, *infra*.

(*n*) *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380, especially at pp 386 ff.

(*o*) *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380; *Smith* v. *Columbia Insurance Co.*, 1851, 17 Penn. 253; *King* v. *State Mutual Fire Insurance Co.*, 1851, 61 Mass. 1.

(*p*) *National Fire Insurance Co.* v. *McLaren*, 1886, 12 O.R. 682.

The case of two persons effecting, in different insurance companies, insurance of the same property in different rights has been stated thus (*q*):—

"Where different persons insure the same property in respect of different rights they may be divided into two classes. It may be that the interest of the two between them makes up the whole property, as in the case of a tenant for life and remainderman. Then if each insures, although they may use words apparently insuring the whole property yet they would recover from their respective insurance companies the value of their interests, and of course those values added together would make up the value of the whole property. Therefore it would not be a case either of subrogation or contribution, because the loss would be divided between the two companies in proportion to the interests which the respective persons assured had in the property. But then there may be cases where, although two different persons insured in respect of different rights, each of them can recover the whole, as in the case of a mortgagor and mortgagee. But wherever that is the case it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons. Each of them may have an interest which entitles him to insure for the full value, because in certain events, for instance, if the other person become insolvent, it may be he would lose the full value of the property, and therefore would have in law an insurable interest; but yet it must be that if each recover the full value of the property from their respective offices with whom they insure, one office must have a remedy against the other. I think wherever that is the case the company which has insured the person who has the remedy over succeeds to his right of remedy over, and then it is a case of subrogation."

6. Application of insurance money.

It is provided by the Mortgages Act, R.S.O. 1914, c. 112, s. 6, as follows:—

6.—(1) All money payable to a mortgagor on an insurance of the mortgaged property, including effects, whether affixed to the freehold or not, being or forming part thereof, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(2) Without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on an insurance of the mortgaged property be applied in or towards the discharge of the money due under his mortgage.

This section was originally passed in 1886 (*r*), and was based on the English Conveyancing Act, 1881 (*s*).

Sub-s. 1 is practically declaratory of the mortgagee's right under the English statute, 14 Geo. III,, c. 78, now cited as the Fires Prevention

(*q*) *North British and Mercantile Insurance Co.* v. *London, Liverpool and Globe Insurance Co.*, 1877, 5 Ch. D. 695 at pp. 583, 584, Mellish, L.J.

(*r*) 49 Vict., c. 20, s. 9.

(*s*) 44 & 45 Vict., c. 41. The clause in the English statute is found in connection with various special provisions as to the mortgagee's power to insure, which were substituted for Lord Cranworth's Act (1860), 23 & 24 Vict., c. 145. See § 2, *supra*.

(Metropolis) Act, 1774 (*t*), s. 83, formerly in force in Ontario (*u*). It gives the mortgagee the right, where insurance is effected by the mortgagor, even where there is no covenant on the part of the mortgagor to insure, or a covenant to insure merely but not to assign the policy, to require the money to be applied in making good the loss or damage (*uu*).

Sub-s. 2 confers on the mortgagee a new right, namely, the right to "require that all money received on an insurance of the mortgaged property be applied in or towards the discharge of the money due under his mortgage." The words "without prejudice to any obligation to the contrary imposed by law" have probably lost their significance since the statute 14 Geo. III. c. 78, s. 83, ceased to be in force. The words "special contract" mean a special contract relating to the insurance (*v*). The sub-section presumably refers to insurance money received by the mortgagor, for no statutory provision was needed as to money received by the mortgagee (*w*).

The mortgagee is not at liberty without the consent of the mortgagor to accelerate the times of payment under the mortgage by applying the insurance money in payment of instalments of principal or interest not yet due, but he may apply it in payment of overdue instalments (*x*). On the other hand, subject to a provision in the mortgage to the contrary, he still has the right, which he had before the passing of the statute, to hold the money as he held the policy, as collateral or additional security for the mortgage debt, and he is not bound to apply it towards payment of either principal or interest overdue (*y*).

"Now the Act does not profess to interfere with any right the mortgagee had theretofore possessed to deal with the proceeds of the policy when the mortgage money was overdue. He was not compelled to apply it at all, or if he did apply it he might apply it in such a way as to preserve the full benefit of his contract. The new right or option which is given to him must, I think, be considered as one controlling any right which the mortgagor might otherwise have had to direct the disposition of the insurance received by or paid into the hands of the mortgagee before the mortgage debt becomes due. In effect the option given by the section is either to have the money applied in rebuilding or to have it at once applied in reducing the debt secured by the mortgage. If the latter option is not exercised the money remains in the mortgagee's hands (in those cases in which he has had, apart from the statute, the right to receive it) as it would have done before the Act, and subject to whatever rights or interests the parties by law respectively had therein, and *inter alia* to the right of the mortgagee to make such application of it as he might deem proper to the payment either of principal or of interest, or of both, overdue, or to make no application of it if he should deem it more advisable

(*t*) See *In re Quicke's Trusts, Poltimore* v. *Quicke*, [1908] 1 Ch. 887; *Sinnott* v. *Bowden*, [1912] 2 Ch. 414.

(*u*) This statute, commonly referred to as the Metropolitan Building Act, was held to be in force in Ontario. *Stinson* v. *Pennock*, 1868, 14 Gr. 604; *Carr* v. *Fire Assurance Association*, 1887, 14 O.R. 487. By the Ontario Insurance Act, 1887, 50 V., c. 26, s. 154, it was provided that the statute should not "be deemed to be in force with regard to property in this Province."

(*uu*) *Edmonds* v. *Hamilton Provident and Loan Society*, 1891, 18 A.R. (Ont.) 347, at pp. 354-355.

(*v*) 18 A.R. (Ont.) at p. 355.

(*w*) 18 A.R. (Ont) at p. 368.

(*x*) *Corham* v. *Kingston*, 1889, 17 O.R. 432.

(*y*) *Edmonds* v. *Hamilton Provident and Loan Society*, 1891, 18 A.R. (Ont.) 347, reversing judgment of the Queen's Bench Division on this point, 19 O.R. 677, and disapproving of *Corham* v. *Kingston*, 1889, 17 O.R. 432, in so far as it may be supposed to have decided that the mortgagee was bound to apply the insurance money on principal and interest as they matured.

for the security of his contract not to adopt that course, but to require the mortgagor to make his payments in accordance with his covenants" (*z*).

If the mortgagee receives the insurance money before the time appointed for payment of the money secured by the mortgage he is entitled, nevertheless, to the interest without abatement (*a*).

"He may keep the insurance money by him and sue for arrears, or distrain for them, if he has that power, or he may at his option apply the whole or part of the insurance money to the arrears. It is part of his security, and whenever there is default he may resort to it, or he may resort to his personal or other remedies. Of course, as soon as the debt is reduced to an equality with the insurance money in his hands he must apply the latter *pro tanto* from time to time to subsequently maturing payments. It hardly needs to be added that a mortgagee retaining insurance money in his hands as security for future payments is accountable for any profit he makes with it, and that he ought not to leave it lying idle, but ought, if possible, to concur with the mortgagor in some profitable way of laying it out." (*b*)

In view of the definition of "mortgage" in the Mortgages Act as including "any charge on any property for securing money or money's worth" (*c*), it has been held that s. 6 of the statute is applicable to the case of insurance effected by a purchaser of land with loss, if any, payable to the vendors. Therefore, when the buildings on the land are destroyed by fire, the vendors are entitled to the security of the insurance money, just as before the fire they were entitled to the security of the buildings, but they are not entitled to apply the insurance money in payment of instalments of the purchase money not yet due (*d*).

Mortgaged property was insured in the name of the mortgagor with loss payable firstly to the first mortgagee and secondly to the second mortgagee as their interests might appear. The first mortgagee having received insurance money applied it on the first mortgage and subsequently sold the property under power of sale. It was held that the insurance money was properly applied, the effect being to reduce the first mortgage for the benefit of execution creditors intermediate between the two mortgagees, and that there was no case for marshalling of two funds as between the two mortgagees (*e*).

Under a contract with the owner of a mill and machinery which was subject to three mortgages (the second and third in favour of the same mortgagees), each containing a covenant to insure, the plaintiffs took out the machinery, replacing it with new machinery, reserving a lien thereon for the balance of the price, the lien agreement providing that the mill-owner should insure the machinery for the plaintiffs' benefit. Before any further insurance was effected the mill and machinery were destroyed by fire. It was held, upon the evidence, that the second mortgagees had consented to the purchase of the new machinery upon the terms specified, and, as a result of that finding, that the plaintiffs were entitled, subject to the first mortgagee's claim, to payment of the insurance money on the machinery and to be subrogated to the first mortgagee's rights against the land to the extent to which that insurance money was exhausted by him (*f*).

(*z*) *Edmonds* v. *Hamilton Provident and Loan Society*, 1891, 18 A.R. (Ont.) 347, at p. 357, Osler, J.A.
(*a*) 18 A.R. (Ont.) at p. 356; *Austin* v. *Story*, 1863, 10 Gr. 306.
(*b*) 18 A.R. (Ont.) at p. 367, Maclennan, J.A.
(*c*) R.S.O. 1914, c. 112, s. 2.
(*d*) *Scott* v. *Crinnian*, *supra*.
(*e*) *Midland Loan and Savings Co.* v. *Genitti*, 1916, 36 O.L.R. 163, 30 D.L.R. 52.
(*f*) *Goldie* v. *Bank of Hamilton*, 1900, 27 A.R. (Ont.) 619.

Obituary

E. F. B. JOHNSTON, K.C.

It is with deep regret and with a sense of great personal sorrow that we record the death of the late Ebenezer Forsyth Blackie Johnston, K.C., who passed away at his residence on Bernard Avenue, Toronto, on January 29th, in his sixty-ninth year.

On a previous occasion we spoke at some length of the early life and career of this eminent member of the Bar and worthy citizen (*ante* vol. 31, p. 321), and to that article we would refer our readers.

Mr. Johnston was born in Scotland December 20th, 1850, coming to this country whilst still young. Like some others who have achieved distinction at the Bar, he began by teaching school in one of the public schools in the county of Wellington. He subsequently chose the law as his life's work, and began practice in the town of Guelph.

Called to the Bar in 1880, he was created a Queen's Counsel ten years later. Practising in Guelph for three years, he then came to Toronto, where, for four years, he was Deputy Attorney-General and Clerk of the Executive Council, and later was Inspector of Registry Offices for Ontario. Mr. Johnston has been the Honorary President of the Ontario Bar Association, and was a Bencher of the Law Society.

His sound knowledge of business methods and his astuteness in commercial affairs, naturally resulted in his being placed on the boards of various banks and companies, but it is with the commanding position he occupied in the legal fraternity that we are more intimately concerned. Whether for the Crown or the defence he was equally painstaking and thorough, both in the preparation of his cases and in his argument, and the remarkable success which followed him was due, undoubtedly, in a large measure to these characteristics. During a great part of his legal career he was looked on as one of our best criminal lawyers. To his telling manner of placing a case before a jury, and his skilful methods of cross-examination were largely due his success in the well-known cases—in which he acted for the defence—of Clara Ford, Hyams, Sifton, Sternaman and Hammond; whilst he was equally well known in those—in which he took the Crown's case—of the Welland dynamiters, Queen v. Harvey, Queen v. Day, and Queen v. Brennan. There will also be remembered his counsel work in the libel action of Sir Geo. Foster against Dr. J. A. Mac-

donald, the Gamey charges, the constable case, and the grocers combine. His address to the jury in the Foster v. Macdonald case has been described as one of the most brilliant ever given in the Ontario Courts.

One of our High Court Judges, in referring to Mr. Johnston, said: "He had a keen appreciation of the turning point in a case. His cross-examination was masterly, and more than once I have seen a case won by a short cross-examination of an important witness."

Like some other leading members of our Bar in the past, Mr. Johnston's experience, knowledge and kindly friendship were always at the service of younger members of the profession. He was always ready to advise and help, and those who knew him best will feel his loss most.

Mr. Johnston's devotion to his legal work did not interfere with his literary and artistic instincts, which were keen and comprehensive, but his success in his chosen profession will be an inspiration to those who desire success honestly earned by honest work.

A. H. F. LEFROY, K.C., M.A.

We have also to record the death of Mr. Lefroy, whose name is well known as that of a writer of repute on questions of constitutional and international law.

Mr. Lefroy was born in Toronto on June 21, 1852, the son of General J. H. Lefroy, K.C.M.G., his mother being a daughter of Chief Justice Sir John Beverley Robinson. He was educated in England at Rugby and Oxford. He was called to the Bar in England in 1877, and to the Ontario Bar in 1878. Mr. Lefroy was Professor of Roman Law and Jurisprudence in the University of Toronto. He was the author of several valuable works on constitutional law, and wrote numerous articles of a legal literary character which appeared in the *Law Quarterly Review* and other publications.

Mr. Lefroy was a man of much literary ability, and may be regarded as having been one of the foremost academic lawyers in the province. He was for some years an assistant editor of this journal, and latterly was editor of the *Canadian Law Times*. His works on constitutional law have an international reputation, and he has thus left a more enduring title to remembrance than many other members of the profession who may have occupied a more prominent place in the public estimation. We can ill afford in this country to lose lawyers of this stamp—men of

liberal education, and with wider views than are necessary for the grubby grind of everyday practice in a solicitor's office.

Mr. Lefroy's death at a comparatively early age came as a surprise to many, but it would seem that his health had not been good for some time past; and it was his lot to mourn, like so many of our profession, the loss of a son, dying as others of our best and bravest have in the defence of the Empire.

Bench and Bar

Judicial Changes in England.

We learn from *The Law Times* that at last the vacancy created in the Court of Appeal by the acceptance by Lord Sterndale of the Presidency of the Probate, Divorce, and Admiralty Court has been filled by the promotion of Mr. Justice Atkin. No better selection could possibly have been made, for, during the period of nearly six years in which he has sat as a Judge of first instance, he has amply proved that he possesses in a marked degree those attributes which go to make a good Judge. His successor in the King's Bench is Mr. Greer, K.C., and the choice, we think, will be approved by the profession.

Students at the Front.

The Attorney-General of Ontario has introduced a Bill for the relief of Law Students who have served in the war which provides as follows:—

1. This Act may be cited as The Law Society Act, 1919.

2. Where any person has served in the Canadian Expeditionary Force, or in the Imperial Expeditionary Forces, or in the Naval Forces in the late war, and is in good standing, or has been discharged in good standing, The Law Society of Upper Canada, notwithstanding anything contained in The Law Society Act, The Barristers' Act, The Solicitors' Act, may, in its discretion, by resolution of the Benchers in Convocation assembled, shorten the period for which such person would otherwise be required to stand upon the books of the Society before being called to the Bar.

3. Notwithstanding anything contained in the said Statutes, or in the Articles of Clerkship by which an articled clerk is bound to serve, the Society may, in like manner, and in such cases, in its discretion, shorten the time of service under such Articles, and any such resolution shall be a complete discharge of such articled clerk from the obligations of such Articles for any time in excess of such shortened period.

4. Notwithstanding anything in the said statutes, the said Society may in like manner authorize such of the aforesaid persons as they may deem proper who were not articled before joining any such Forces, to enter into Articles of Clerkship for such shortened period as they may deem proper in each case.

5. The Benchers may make such rules as they may deem necessary for the better carrying of this Act into effect.

Law Society of Alberta.

The twenty-second convocation was held at Edmonton on the 7th, 8th and 9th days of January, 1919.

The Benchers present were:—

Messrs. James Muir, K.C., LL.D., President, in the Chair; C. F. P. Conybeare, K.C., D.C.L., Vice-President; R. B. Bennett, K.C.; A. H. Clarke, K.C.; J. C. F. Bown, K.C.; Frank Ford, K.C., D.C.L.; A. F. Ewing, K.C.; C. C. McCaul, K.C.; W. A. Begg, K.C.

The following information is extracted from the Secretary's report:—

Numbers of Barristers and Solicitors on the rolls at 31st December, 1918, 743; number added during half year, 10.

Of these the following were students-at-law of the Society, who had been admitted to the Bar pursuant to the rules:

Samuel Bacon Hillocks, Wilfred Gustave Soltau, John Vaselenak, Vernon Elgin Way, B.A.; Frederick Tennyson Congdon, K.C.; Orrin Henry Eyres Might.

The following were admitted from other Provinces:—Robert Howarth, English solicitor; Lawrence Edward Ormond, Nova Scotia Barrister and Solicitor; John Harris, Scotch Solicitor; Jean Baptiste Dalphond, admitted from the Province of Quebec.

Total number in active practice, including members kept in good standing while on active service without payment of annual fee, 488. Number of students enrolled during half year, 20. Number of conditioned students, 1.

The following Barristers and Solicitors have been reported during the half year as killed in action, died of wounds or missing on active service:—

Stanley Donald Skene, Calgary; William Jermy Jephson, Calgary; John Douglas Hazelton, Olds; Frank James Ap'John, Edmonton; Robert William Cassels, Edmonton; Charles Arnold Grant, K.C., Edmonton.

The following Barristers and Solicitors have died during the half year:—

Clare Montrose Wright, Calgary; William Brooks Waters, Calgary; Louis Dorais Methot, Pincher Creek; Joseph Edward Caldwell, Moose Jaw, Sask.; Thomas Sydney McMorran, Regina, Sask.

The following resolutions were passed:—

Resolved, that in the opinion of the Benchers of the Law Society of Alberta in Convocation assembled the question of judicial salaries should receive early consideration and that such increases should be made as will render the salaries adequate for the support and maintenance of the Judges and their families according to the dignity of their positions; the scale recommended by the Canadian Bar Association at its meeting in Montreal last summer meets with our approval, and further, that by reason of the volume and importance of the litigation now being dealt with in the Western Provinces and of the high cost of living in the West, the salaries to the Judges in these Provinces should be as great as those paid in any of the older Provinces.

Resolved, that Dr. C. F. P. Conybeare be appointed a committee of one to obtain suggested designs and estimated cost of erecting duplicate tablets in the Edmonton and the Calgary Court Houses to the memory of the members of this Society who have fallen in the war, and report to next Convocation.

Resolved, that Wednesday the 2nd day of July, 1919, at the Banff Springs Hotel, Banff, at 10 o'clock a.m. be fixed as the time and place for the holding of the next meeting of Convocation.

JAMES MUIR, President.
CHARLES F. ADAMS, Secretary.

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NERVOUS SHOCK AS A SUBJECT FOR DAMAGES.

In 1888 the Judicial Committee of the Privy Council decided on an appeal from an Australian Court in the case of *Victorian Railway Commissioners* v. *Coultas*, 13 App. Cas. 222, 58 L.T. 390, that damages arising from fright occasioned by the negligence of a defendant are not recoverable. The facts of that case were, that through the negligence of a railway company, the plaintiff had been invited to cross their railway where a train was approaching, and had very narrowly escaped being run down by a train of the defendants. The plaintiffs were husband and wife, and the wife was so terrified by the danger she was in, that she fainted and suffered a severe injury to her nervous system and was ill for a long time in consequence thereof. The Colonial Court held that the plaintiffs were entitled to recover damages in respect of the nervous injury thus occasioned, but the Judicial Committee reversed the decision, holding that such damages were too remote. This decision has been somewhat adversely criticized; it was, however, followed in Ontario by the Court of Appeal in *Henderson* v. *Canada Atlantic Ry.*, 25 A.R. 437, and also by a Divisional Court in *Geiger* v. *Grand Trunk Ry.*, 10 O.L.R. 511. In the latter case Clute, J., dissented and expressed the opinion that where there had been a physical injury the jury ought not to be asked to assess damages separately in respect of the physical injury, and of the nervous or mental injury, as was done in the *Henderson* case, a task which it would necessarily be difficult for any jury to perform with any degree of accuracy. In the more recent case of *Toms* v. *Toronto Ry.*, 22 O.L.R. 204, affirmed, 44 S.C.R. 268, the case of *Victorian Railway Commissioners* v. *Coultas*, *sup.*, was held not to be applicable where there was an actual physical injury, though slight, followed by, or occasioning serious nervous disorder, and the view expressed by Clute, J., as to the assessment

of damages in such cases was adopted. This case having been affirmed by the Supreme Court of Canada seems to reduce the effect of the *Coultas* case to somewhat narrow dimensions as far as Canadian Courts are concerned. Cases where actual bodily injury is sustained accompanied by, or occasioning, nervous disorders are in effect held to be excluded from its operation, because in such cases juries may be asked to assess damages not only for the bodily injury but also for any consequent nervous or mental injury; and according to this view of the decision, the *Coultas* case only applies where there is no physical injury, but only mental or nervous injury occasioned by fright or shock. But even reduced to such narrow limits the decision has failed to command assent in English Courts, which are at liberty to disregard the decision.

Reduced to its simplest terms, the question resolves itself into this: "Can it properly be said that the damages claimed for mental or nervous shock are, or are not, the necessary result of the defendant's negligence in any given case?" The unexpectedness of the result can hardly be said to be a proper criterion for answering that question; rarely can any injury be said to be the expected result of any act of negligence because it is always the unexpected which is happening; and the only ground for determining the question of damages is the actual state of facts which can properly be said to result from the negligence complained of.

It is impossible to say in respect of any act of negligence, that such and such results must be deemed to follow from it, and no others; because that is contrary to all experience. No one is competent to lay down any rule for determining in advance what will necessarily be the result of any act of negligence; its results may be manifold and altogether unanticipated; and the facts of each case are therefore unique, and the law in each case must in reason depend on its own particular facts. It cannot be said that because a severe fright may not affect the physical constitution of a man that therefore it cannot affect the more delicate organism of a woman. Such an act of negligence as was complained of in the *Coultas* case left the man who was in the vehicle unharmed, and as a matter of fact left the woman a nervous wreck; and

to say that, although for a shattered leg she might have recovered damages, yet for a shattered nervous system she is entitled to no redress, seems somewhat difficult to reconcile with sound reason. At all events, that seems to be the view to have been entertained by other Courts in regard to the principle of the *Coultas* case, even in its restricted application above referred to.

For instance, in *Wilkinson* v. *Downton* (1897), 2 Q.B. 57, 76 L.T. 493, the action was brought by husband and wife against the defendant for having falsely reported to the female plaintiff that her husband had been seriously injured, he knowing the statement to be untrue; in consequence of which the wife suffered great distress of mind, and became ill and her hair turned gray; and it was held by Wright, J., that the plaintiffs were entitled to recover, and judgment was given in their favour for £100, the learned Judge refusing to follow the *Coultas* case. That decision the learned Judge remarks was treated by the Court of Appeal in *Pugh* v. *London and Brighton & S.C. Ry.* (1896), 2 Q.B. 248, 74 L.T. 724, as open to question, and he also considered it to be inconsistent with the decision of the Court of Appeal in Ireland in *Bell* v. *Great Northern Ry.*, L. Rep. Ir. 26 C.L. 428, where that Court had expressly refused to follow it; Palles, C.B., in the latter case, refers to and follows an unreported Irish case of *Byrne* v. *Great Southern & Western Ry.*, where it was held by the Irish Court of Appeal that damages were recoverable for nervous disorder unaccompanied by any external injury to the body.

In *Ham* v. *Canadian Northern Ry. Co.*, 22 Man. R. 480, the plaintiff, while travelling on a street car with which one of the defendants' engines collided, was thrown with the car down an embankment. His physical injuries, so far as could be seen, were slight, but the mental shock he received was very serious, and acute neurasthenia and insomina followed and continued up to the time of trial, incapacitating him from doing any work, and causing him great suffering. The *Coultas* case was relied on by the defendant, but Prendergast, J., who tried the action, considered that it had no application because the expert evidence was to the effect that, although the visible wounds or injuries were insignificant in themselves, still the shock which caused the neurasthenic

condition was not only mental but also physical. He gave judgment therefore in favour of the plaintiff which was, on appeal, affirmed by the Court of Appeal.

In the Quebec case of *Montreal Street Ry.* v. *Walker*, 13 Que. K.B. 326, the jury found that a car of the defendants in which the plaintiff was travelling, through the negligence of the defendants, ran off the track, and the jury found that the plaintiff thereby sustained a nervous and physical shock, and judgment was given for the plaintiff for the damages assessed. On appeal the *Coultas* case was relied on by the defendants, but after referring to the criticism of that case in Pollock on Torts, 5th ed., p. 50-52, Blanchet, J., who gave the judgment of the Court, said. "In principle fear is not a cause of action for damages because ordinarily it produces no physical ill, but if such ill result from it, then there would be liability. This is the doctrine of our law whenever it is established that the fear or nervous shock has been the efficient cause of the damage proved by the victim."

The Court, therefore, in that case treated the *Coultas* case as merely affirming the principle that mere fear gives no ground of action, but the facts of the *Coultas* case shew that the decision in effect went a good deal further than that, for there the result of the fear caused physical suffering, and yet the plaintiff failed.

The most recent decision in the English Courts on the subject is that of *Janvier* v. *Sweeny*, 146 L.T. Jour. 382, which was somewhat similar in its facts to *Wilkinson* v. *Downton*, *supra*. According to the plaintiff's evidence, one of the defendants called on her and stated that he was an inspector from Scotland Yard, and represented the military authorities, and informed her that she was the woman they had been looking for, and that she had been in correspondence with a German spy. The jury found that the statement was made with the authority of the other defendant, and that the statement was calculated to cause physical injury though not maliciously made, and that the plaintiff suffered illness in consequence of the statement. Avory, J., following *Wilkinson* v. *Downton*, gave judgment for the plaintiff, and the Court of Appeal (Bankes and Duke, L.JJ., and Lawrence, J.) affirmed the judgment.

The fallacy underlying the *Coultas* case seems to consist in the unwarranted assumption that nervous and mental disorders are not physical. "Physical," according to the dictionary, is a term to signify something pertaining to the material part or structure of an organized being, as opposed to what is mental or moral: but how can it be said that the nervous system is not strictly a physical part of the human organism? Nerves are actual organisms as much as legs and arms, and for that matter so are brains. On what intelligible principle of law can it be said that if you negligently injure a man's leg you are liable in damages, but if you only destroy or injure his nerves you are not responsible? And even in the case of mental disorders resulting from negligence if they are due to a disorder of the brain brought about by the negligence complained of, why in reason should they not be equally a subject for compensation? The brain is surely as much a physical part of the body as a leg, and of the two, the more important. The difficulty is that while an injury to a leg can be seen an injury to the brain or nerves is frequently only manifested by its effects, and the nature of the injury is more or less a matter of conjecture; but any attempt to exclude such injuries from the category of physical injuries seems to be unfounded in reason. It has been remarked by a learned Judge: "That fright—where physical injury is directly produced by it—cannot be a ground of action merely because of the absence of any accompanying 'impact,' appears to me to be a contention both unreasonable and contrary to the weight of authority," *per* Kennedy, J., *Dulien* v. *White* (1901), 2 K.B. 669, 85 L.T. 126; but that learned Judge goes on to say that it is necessary that the fright should have been occasioned by an act of negligence in regard to the person affrighted. It is not sufficient that the fright should have been occasioned by an act of negligence towards someone else, such as was the case in *Smith* v. *Johnson*, an unreported decision referred to by Kennedy, J., where a man was killed negligently in sight of the plaintiff, and the plaintiff became ill, not from the shock produced by fear of harm to himself, but from the shock of seeing another person killed.

POWERS.

In Farwell on Powers, 3rd ed., p. 56, the learned author writes in reference to the creation of powers: "It is submitted that the true principle is that a man may by any disposition, by which he himself is able to assure an estate or interest, legal or equitable, in property, confer upon another power to assure a like estate or interest to third persons." We are inclined to think that the proposition would be better stated in this way: "A man may confer upon another power to assure to himself, or some other person, any estate or interest in property which the donor of the power is himself entitled to convey."

But there is this limitation on the rights of the donor of a power, viz.:—"The author of a power may surround its execution with as many solemnities, and direct it to be carried out by such instruments, at such times, with the consent of or by such persons as he pleases, *provided that he does not transgress the rules of law or equity.*" Farwell on Powers, 3rd ed., p. 147. In other words, the donor of a power cannot alter the rules of law or equity which regulate the transmission of property. We may further observe that powers under wills and deeds are both distinguishable from a power to convey an estate under a letter of attorney. The estate raised by the execution of a power (whether it be created by deed or will) *takes effect as if limited* in the instrument creating the power. Sugden, p. 199.

We have been led to make these observations after perusing the recent case of *Re Spellman and Litovitz*, 44 O.L.R. 30.

In that case, which was an application to the Court under the Vendors and Purchasers Act, an objection was made by the purchaser, that a certain mortgage incumbrance had not been properly discharged. The facts connected with it, were that it had been made in favour of several executors and that the certificate of discharge had been executed only by a majority of them. The learned Chief Justice who heard the application expressed himself as strongly of the opinion that a mortgage made to several executors or trustees of a will could not be validly discharged by some of them, unless some special power has been conferred upon some of them so to do; but he held that this special power had been

conferred in the case in hand; because, by the will of their testator, power was given to a majority of the executors to discharge any mortgage which they might take in the performance of the trusts of the will.

The case it must be borne in mind, therefore, was not the case of a mortgage made to the testator and devolving on the executors as part of his estate; but it was the case of a mortgage made to the executors themselves in the execution of their duties. The mortgaged property had, therefore, never been in the dominion of the testator, and he had never at any time any right of conveyance in respect of it. In these circumstances, therefore, the case would have been more informing if the learned Chief Justice had specially dealt with that aspect of the case. He refers to some observations of Mowat, V.-C., in *Ewart* v. *Gordon*, 13 Gr., at p. 57, where it is said: "If it is the will of a testator that any one or more of those he names should have authority, without the concurrence of the others, to sell his real estate, or receive the purchase money, it is within his power to say so," and the learned Chief Justice seems to rest his judgment on that dictum. This, however, it may be remarked, was the case of a power in reference to the testator's own property over which he had a dominion, and not in regard to property which becomes vested in his executors after his death, and over which the deceased never had dominion. Moreover, such a power as that in question in *Re Spellman and Litovitz* appears to "transgress the rules of law." By the taking of the mortgage there in question a joint estate became vested in the mortgagees at common law; that estate could only be effectually reconveyed according to the rules of law by all the mortgagees or the survivor or survivors of them, in case of the death of any, joining in the reconveyance or discharge.

The testator virtually sought to abrogate this rule of law, and to empower some to do, what the law requires all to join in doing: see *Matson* v. *Denis*, 10 Jur. N.S. 461.

The power, therefore, under which the executors assumed to discharge the mortgage in question appears to have been legally ineffectual for two reasons: (1) because it related to property over which the donor himself never had any dominion, and (2) because

it assumed to transgress a rule of law by empowering some of several joint tenants to convey the joint estate.

The provisions of the *Registry Act*, R.S.O. c. 124, ss. 62, 68, and the *Interpretation Act*, R.S.O. c. 1, s. 28 (*c*), seem really to have no application to the circumstances in question in *Re Spellman and Litovitz*, as they are directed to the case of personal representatives of a mortgagee discharging mortgages made to their deceased testator or intestate, and not to the case of mortgages made directly to the personal representatives themselves.

In this view of the matter, although the decision of Blake, V.-C., *In re Johnson*, 6 P.R. 225, may possibly still be good law, having regard to the *Interpretation Act*, s. 28 (*c*), the case of *In re Spellman* and *Litovitz* may, on the other hand, be open to question, and we should be inclined to counsel the profession to be wary about putting their faith in it.

Possibly it may be said that if the power in question was not effectual in law to enable some of the executors to reconvey the mortgaged land, so as to revest the legal estate, it might nevertheless have some effect in equity as authorizing some of the executors to receive and give acquittance for debts due to them all; and though the property in question was never vested in the testator, it was security for part of his estate.

ONTARIO BAR ASSOCIATION.

ADDRESS OF MR. HENRY R. RATHBONE, OF CHICAGO, DELIVERED AT THE LAST ANNUAL MEETING.

The United States has seen great changes in its attitude towards the law. We started out as a young people with a great deal of spread-eagleism, as you know. Everything American was surely the best. We could point the way towards justice and the proper administration thereof to other nations, we felt quite sure. Now, I think the pendulum has rather swung to the other side. There is, perhaps, I might say, a tendency on the part of many American lawyers and citizens to rather depreciate the

administration of justice in the United States. The old spirit of cocksureness has surely gone. That was illustrated perhaps by the story of the little boy who was asked by his school teacher, "Willie, who was the first man?" "George Washington" was the reply. "Oh no, Willie; George Washington was not the first man; Adam was the first man." "Well, perhaps, if you are speaking of foreigners maybe he was."

But I can assure you with all sincerity there is great admiration on the part of the American Bar and American citizenship of British justice; and when some criminal is acquitted that the public thinks should have been convicted, very often indeed when it has taken a long period of time to secure a jury, or when something goes wrong in the administration of our justice, you hear the remark made on every hand "How much better they do it in the British Dominions. There this man would have been convicted; he would have been quickly brought to justice." Yet we must realize that each nation must be guided by its own peculiar conditions. As you know in our State of Illinois—of course this does not apply to the Federal Courts—our judiciary is elective. When I left Yale College I was firmly convinced that that was the wrong system. All our teachers had stoutly maintained that an appointive judiciary must be the best. I confess, however, speaking for ourselves alone, that I think the elective judiciary has worked rather well than otherwise. We have a certain responsibility to the people; we have produced some eminent jurists elected under that system. We have a majority of the Judges, I think I may fairly say, who give reasonable satisfaction, and only comparatively few who might be considered below par. Now, there are things that contribute to and help to bring about this situation, and one is the attitude of the Bar Association. If an elective judiciary were purely a partisan matter, as some would have it, no doubt it would stand at once condemned, but the Chicago Bar Association, and I think other Bar Associations, have been very strong on that subject. Wherever a judicial change is to take place we hold what is called a Bar primary. We send out to all the many members of that association a ticket made up of the names of those appearing on the Republican,

the Democratic, the Socialist, the Socialist Labour ticket, or whatever name it may be, whether it has any chance for election or not. Those names on that ticket are arranged in alphabetical order, with nothing to indicate their politics, or on what ticket they are to run; and the Bar Association then votes upon those names. This has contributed very largely to the success of many candidates. I can name many instances in which excellent Judges who have served the people perfectly and well would have been condemned, knifed at the polls, defeated by the party organization, but they have gone through and been elected because of the action of the Chicago Bar Association. This is due to the fact that their action, their verdict, is published far and wide in the press. Every one knows it, and even the men of limited education will say, "Well, the lawyers ought to know better than the rest of us; we will follow their lead." Then their action is taken up by the press of the city, which wields a tremendous influence upon the independent voter, and it is generally the case that the Judges elected are divided fairly equally between the great parties. The Socialist candidates seldom poll more than perhaps twenty votes at the Bar primary.

I was much interested in the address yesterday by your President, and it was interesting to me to see that some of the problems which you are meeting here are those with which we have been contending for years. There seems to be a tendency among us towards what might be called specialists. We have gone in some directions further than you have, in others not so far. Of course, you probably know we have specialists in the Courts. This is done in a rather peculiar way. What your President said yesterday about the establishment of Criminal Judges has called my attention to this fact. We have the Circuit and Superior Courts, regular Trial Courts, and in addition to those we have the Municipal Court created by special Act in 1896, with jurisdiction within the limits of the City of Chicago, with twenty-seven Judges. We have these Judges assigned from time to time to other special Courts. We have no Judges specially elected to the Criminal Court, but Judges are assigned from the Circuit and Superior Courts to the criminal branch, a period of one or two years. That might seem

the very opposite of specialization, and yet it often works along those lines, because those Judges who are specially qualified for work in the criminal Courts are practically always seated there. I have one Judge in mind who has probably been on the Bench at least for over fifteen years, constantly re-elected, and I do not believe he has sat for more than one month outside of the criminal branch. This happens because some Judge of the Circuit or Superior Court is assigned to the Criminal Court. He at once applies to this Judge, whose reputation as a criminal jurist is well known, and they exchange positions, and thus these men who are specially fitted to sit in that branch are enabled to do so. Another Court in which—if you will pardon me in saying so—I have always taken a special pride, is the Juvenile Court. You are perhaps aware that that originated in Chicago, and so excellent has been its work that I know that people from all over the civilized world have been constantly visiting that Court and watching its practical operation, and indeed the people of democracies are not so ungrateful, and the Judges who started, and one man especially who began with that Court, and another man who succeeded him, are practically impossible of defeat. No partisanship could relegate them from the Bench, I fully believe. Their work was so creditable and so excellent there that they are practically assured of a position on our Bench as long as they live.

In the Municipal Court we have specialized still further. We have, as you know, the Court of Domestic Relations. We have the Boys' Court. We have a Court even called the Speeders Court. One Judge sits there every day regularly assigned to pass upon violations of the automobile ordinances. The general opinion is that that has worked very well. Recently we have established another special branch, and that is a Judge who sits on nothing else but default divorce cases—a tremendous strain, a thankless job, but under our system and under our laws under which there are nine grounds of divorce admitted, this Judge has a tremendous task to perform, and one which is absolutely necessary to be met. To summarize, we have found that specialization in these different courts has worked well.

Now, we have not gone so far as England in the matter of

specialization among attorneys. From the very beginning I think it has always been the case in the United States that we have never observed the distinction between barrister and solicitor; but nevertheless those things find their own level, and gradually lawyers have become more and more specialists with us. You go into the Courts of Chicago where the greatest trial work is performed, and you will find there as a general thing a certain set of lawyers who are carrying out the trial work of the county. We have in Cook County perhaps 6,000 lawyers who are practising there, and a comparatively small number of those are doing the active trial work; some of them at least as much as English barristers do. They are practically in Court all the time. They try a tremendous number of cases every year. They are apt to be those who represent the great transportation companies, insurance companies, etc., and lawyers that often represent the plaintiffs in cases against them.

We are grappling, gentlemen, with two great problems in which we cannot truthfully say we have as yet met with success. But we are trying to solve them. The first one is uniformity of procedure. Of course, in Illinois, as you may know, we still cling to the old common law, largely modified by statute, and I for one cannot say that my faith in the common law has been in the least shaken; but when in 1896 we established the Municipal Court we started in with a totally different procedure. There, instead of the old forms of pleading, we had what we have considered the most simplified pleading possible; a man would simply state a fact or two in what is called the statement of claim, perhaps three or four lines of typewritten matter, and it stood as his pleading. The same with the defence. But that has been modified to a certain extent, because the Supreme Court of Illinois has recently held, and of course what the Supreme Court says is law on matters of pleading, even in the Municipal Court, the pleader on either side must state sufficient facts to make out a case or a defence. Now, we have other modes that are very decidedly different in the two Courts. In the State Court we still have the system of written instructions. The attorneys prepare in advance certain instructions; they must hand them up to the Trial Judge

before the arguments of counsel commence; the Judge by statute is then required to write on the margin of those instructions either "Given" or "Refused," or he may modify them. The "Given" ones are read to the jury, the "Refused" are put to one side; they are taken by the jury to the jury room and are part of the exhibits in the case. The Municipal Court has something entirely different, and that is a system of oral instructions. This we have come to feel is a mistake, that it is not the proper way to do, to have such totally different methods of procedure going on in the same community at the same time; so that only a few days before I left to come here there was a meeting of the judiciary of all Courts of the City of Chicago, and they agreed on a proposed bill of certain modifications and changes in the law. The first point and most essential of them all was to establish a uniform practice; and that will be presented undoubtedly to the State Legislature at an early moment, if it has not been done already; and when the judiciary and the lawyers are back of any movement of that kind it is usually safe to predict that the Legislature will follow their lead. So that I think we may look very soon to find in the great State of Illinois a simplified and uniform procedure.

But still another problem demands our attention, and we are very far from having solved it, and since arriving in Toronto I have inquired if you were troubled with the same thing—I am very pleased to know that you are not—and that is the old, old evil which Shakespeare enumerated through the lips of Hamlet, as one of the ills that flesh is heir to, the law's delay. There we have at least proved deficient. Not altogether in some respects; our Supreme Court, the highest tribunal sitting at Springfield, is fairly well up with its work; it has about four terms a year, and usually disposes of a case if not at the first, at any rate at the second term. But our Appeal Courts, the first appeal—there are four branches in Cook County of three Judges each, made up of the Judges of the Circuit and Superior Courts who are assigned to them—have been very steadily behind, but they are catching up to a certain extent. The work there, however, is very considerably delayed, of course depending on which Court it happens to be. But it is in our Trial Court, not so much in the matter of small

claims or wage claims, or those claims disposed of in the Municipal Court, or in criminal cases, there is not so much there; but in our regular Trial Courts we are sadly behind, and we find a situation which is demanding our attention. Judges have tried to remedy it of their own motion, but it is hard to hold the line exactly without going too much on one side or the other. For instance, the Judge may be altogether too strict. Different calendars are assigned to these Judges, and they take a certain pride, and there is a certain rivalry, in disposing of the cases, and keeping up with their work. Some Judges have gone to the extreme. I have known of a Judge having a list of one hundred cases, and he expected the people to be ready right away in those cases for trial; and if it should happen that the first case was ready for trial there would be no trouble, but if, for some reason or other, there were grounds for continuance, or the case should go off, there would be a run on the calendar which is almost as bad for lawyers as a run on the bank; and the Judge would go down the list, and if he was inclined to be severe he would dismiss the cases wholesale, which was of course a greater injustice to the people interested. On the other hand, it often happens that where there is a run on the calendar the Court cannot find any case to try during that day. He is practically, to use a common expression, put out of business that day; he has nothing to do. The first case goes off, and perhaps lawyers have relied on the first attorney or two being ready, and he at the last minute is disappointed, or perhaps he is called hurriedly into the trial of a case ahead of that one, and is actually engaged, which is ground for passing the case; and so we have a great deal of confusion. We are grappling with that problem and we hope to solve it.

[The speaker then referred at length to the work done by members of the Illinois Bar during the great war. This began by their valuable and energetic efforts to assist in suppressing and bringing to justice those engaged in the insidious and treasonable propaganda of the pro-German population. This was followed by an immense volume of work in connection with the war, most interesting, but which we have not space to refer to. Mr. Rathbone concluded as follows:]

In conclusion I only want to say this, we have in common a great bond, and that is the bond of Anglo Saxon free institutions. We realize now perhaps more than anything else when this world is threatened with the treachery of Bolshevism what those institutions mean. It is for us lawyers to do our duty, to play our part as men; it makes no difference whether it is in the United States or Canada, the principle is the same, this great inheritance of Anglo-Saxon liberty is ours, ours to preserve, ours to protect, ours to transmit unimpaired to future generations.

CHANGES IN ENGLAND IN LEGAL MATTERS.

THE MINISTRY OF JUSTICE AND JUDGES.

The turmoil and unrest that pervades everything these days has invaded the conservatism of matters pertaining to Bench and Bar in England. The question of an entirely new departure in the way of a Ministry of Justice is being discussed *pro* and *con*. One of the changes which might be the result of this new machinery would be in relation to judicial patronage. It is said that there is less danger of the evil of political influence in the appointment of Judges when the patronage is in the hands of the Lord Chancellor, and it is the prevailing thought that he, assisted by an advisory committee, should make all judicial appointments. It is a thousand pities that something of this kind is a practical impossibility in Canada. Realizing this, there are those who think that, after all, the other extreme, namely, the elective system prevailing in the United States, would be an improvement. In support of this is cited the argument in its favour of Mr. Rathbone in his address at the recent meeting of the Ontario Bar Association. The elective system is repugnant to our ideas, but the combination of political patronage and the inadequacy of salaries are potent factors in lowering the standard of days gone by.

LEGAL EDUCATION.

The treatment of legal education in the old country is in a transition stage, or rather, perhaps, is likely to arrive there shortly.

One authority on the subject says that "it is nothing less than a scandal that no national school of law exists in England." The difficulty seems to be mainly in the way of vested interests. We are told that on one hand there is the Council of Legal Education, on the other the Law Society's scheme of education in London, whilst in addition there are the faculties of law at the universities. They have perhaps something to learn from this country in the way of systematic legal education.

FUSION OF BARRISTERS AND SOLICITORS.

Strong exception is taken in legal journals to a proposal warmly advocated by others for a fusion of the two branches of the profession, which is the rule here. It is claimed that it would help nobody and be detrimental to the public.

THE ADMISSION OF WOMEN.

A change of thought has come to English lawyers since the war as to the admission of women to the ranks of the legal profession. They have proved themselves so brave and helpful and so equal to the sterner sex in many avocations which they had not taken up before, that the determined hostility of the profession in the past is breaking down, and prejudice disappearing.

The time may soon arrive when the door will be open alike to men and women in the old country. While this may come as one of the many unlooked-for results of the war, nothing has happened which would do anything more than give them the right to shew their capacity in this new line of business. Women lawyers are no new thing in this country, but very few women have taken advantage of the open door here, nor have any of them gained any particular distinction in our ranks. The fact is that, speaking generally, women have their own sphere of usefulness, quite different from that of the male sex, and nobly and devotedly most of them fill it; but whilst we men respect and admire many qualities in them which we cannot attain unto, we have a feeling that when they enter the turbid, and too often in these days the malodorous arena of legal practice, they seem to have in a measure "fallen from their high estate," and for this reason we are sorry to see them there. In the last number of the *Journal*

of Comparative Legislation, Mr. Justice Riddell collects statistics as to the number of women in the profession in various countries, and summarises what he has found, so far as Ontario is concerned, as follows:—"The admission of women to the practice of law has had in Ontario no effect upon the Bar or the Courts; the public and all concerned regard it with indifference; while no one would think of going back to the times of exclusion, no one would make it a matter of more than passing comment that a woman lawyer was engaged in the conduct of legal business. It has prevented any feeling of injustice, sex oppression, or sex partiality—it has made the career open to the talents. Otherwise it has no conspicuous merits and no faults."

LEGISLATIVE INTERFERENCE WITH TESTAMENTARY DISPOSITIONS.

Under the civil law a testator has not the right to dispose of the whole of his property without regard to the claims of his family. Thus, by s. 913 of the Code Napoléon an owner cannot, either by gift *inter vivos* or by will, dispose of more than half his property if he leaves one child, a third if he leaves two children, a fourth if he leaves three or more. In Scottish law we have the children's legitim and the widow's *jus relictæ*. Dower in ordinary English law is the only right that at all corresponds to these rights under the civil law—unless we add curtesy.

Both dower and curtesy have been legislated out of existence in many of the oversea dominions where English law prevails, but there is at present a movement in the opposite direction, and in more than one part of the dominions statutes of a novel kind have been enacted since the beginning of the present century for the purpose of curbing the uncontrolled right of a testator to leave his family inadequately provided for. The principle of the civil law has been adopted, and a right to some share in the property of a deceased person, notwithstanding any testamentary disposition of that property, has been conferred on his widow and children. This right, however, is not, as it is under the civil law, a legal right properly so called according to the nomenclature of

English jurisprudence, except that it is conferred by statute, and possibly all statutory rights should be classed as legal in one sense. The statutory right conferred on the testator's family has all the characteristics of what English lawyers would generally call an equitable right, inasmuch as it consists in the right to apply to the court—and, where common law and equity are not administered concurrently, to the court in its equity jurisdiction—for suitable provision to be made out of the estate of the testator in the hands of his representatives.

The home of the legislation referred to is New Zealand, and apparently as yet similar statutes have only been enacted in Victoria and New South Wales. It would not be surprising if enactments on the lines of these statutes were to find favour in other parts of the Empire, even in the United Kingdom itself—except, of course, Scotland, where they are not necessary. The movement in favour of the creation of a Public Trustee originated in New Zealand, with the result that the Public Trustee is now an established institution here.

The first New Zealand Act on the subject was passed in 1900. Victoria followed in 1906, and New South Wales in 1916. The enactments now in force in New Zealand are contained in ss. 32-36 of the Family Protection Act 1908 (No. 60), those in force in Victoria in ss. 108-117 of the Administration of Probate Act, 1915 (N. 2611), and the New South Wales enactment consists of ss. 1-12 of the Testator's Family Maintenance and Guardianship of Infants Act, 1916 (No. 41). The New Zealand and New South Wales provisions are substantially dentical; those of Victoria differ slightly.

The scheme of the statutes is as follows: If a testator leaves his widow and children insufficiently provided for, the court may be applied to and may order a suitable provision to be made out of the testator's assets. In New South Wales and New Zealand, though not in Victoria, the Act applies to the case of a woman leaving her husband insufficiently provided for. The provision ordered by the court may, in New Zealand and New South Wales, take the form of either a "lump sum" or periodical payments. In Victoria nothing is said in the statute itself about a lump sum,

and it has been held that periodical payments only can be ordered. (*Re Mailes*, 1908, V.L.R. 269; *Re Bennett*, 1909, V.L.R. 205): In New Zealand and New South Wales the provision ordered by the court is inalienable without the leave of the court; in Victoria the court may, but need not, impose a restraint on alienation (*Re Mailes, sup.*).

The discretion of the court is left unfettered—the provision is to be such "as the court thinks fit"—in New Zealand and New South Wales. In Victoria a widow is not to receive more than £1,000 a year, nor more than her income would have been had her husband died intestate. There is here very obviously a wide field for the creation of case law in the approved English fashion in order to determine the proper limits of the judicial discretion conferred by the statutes. Already some twenty cases (chiefly on the New Zealand statutes) have been decided by the courts upon the subject. As might perhaps have been expected, the statutes have been relied on, and the courts asked to make provision under them, in a considerable number of cases where a second marriage had taken place and the children of the first marriage left out in the cold. In more than one case Judges have referred to the statutes as casting upon the court a duty of extreme difficulty, and unedifying family quarrels have sometimes been brought to light. The latter kind of case is illustrated by one in New South Wales—*Re Harris* (1918, 18 State Rep. 303). Some general principles have, however, been laid down, and these (as formulated in a New Zealand case), have been approved by the Privy Council: (*Allardice* v. *Allardice*, 106 L.T. Rep. 225; (1911) A.C. 730).

In this case the testator died worth £20,000. He left a family by a first wife unprovided for, among them three married daughters. The New Zealand Courts ordered £60 a year for life to be paid to one daughter and £40 a year for life to each of the other two. It was laid down by the New Zealand Court of Appeal that the court was not empowered to make a new will for a testator, but could only provide for proper maintenance and support of "widow, husband, or children" where adequate provision had not been made by the testator, and that the standard for the court to be

guided by was (as to widow and children) the position in which they had been maintained in the past. The judgment to this effect was approved by the Judicial Committee, and it was observed in the course of the committee's judgment, that "the matters of fact so carefully analysed" in the courts below were "essentially questions for the discretion of the local courts."

It may be questioned whether this experiment in legislation will prove quite successful in its present shape unless some more clearly defined rule for the exercise of judicial discretion is set in the statutes themselves. The more satisfactory plan would seem to be to boldly adopt both the principle and the method of the civil law and secure definitely to a widow her *jus relictæ* and to children their legitim as in Scotland.

The statutes above referred to leave one loophole which no doubt will sooner or later be taken advantage of. They apply only to testators. In the event of intestacy no application can be made to the court, so that if the intestate had denuded himself in his lifetime of all his property, as by gifts or voluntary settlements, a widow or child in whose favour no such gift or settlement had been made would be unable to secure an adequate provision out of the husband's or father's property.—*Law Times.*

MOTOR-CARS AND DISTRESS FOR RENT.

Is a motor-car in a garage, where it is ordinarily housed, liable to be distrained for rent by the landlord of the premises? This question does not seem to have been yet formally decided by the courts in England. A car standing in a garage merely for exhibition would not be exempt from distress: (*Simms Manufacturing Company* v. *Whitehead* (1909) W.N. 95.) Whether a motor-car standing in the garage where it is usually kept ready for the owner's use can be seized by the landlord as goods on the demised premises liable to distress depends on whether it comes within the second class of the "five sorts of things which at common law were not distrainable," viz., "Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ": (*Simpson* v. *Hartopp*,

1743, Willes, 512; 1 Sm. L.C.). This being the principle, the nearest analogy to be found among the actual decisions of the courts seems to be the case of horses and carriages kept on a livery-stable keeper's premises.

Now, there are two reported cases in the English courts, one in the King's Bench and one in the Common Pleas, in which it was decided, in the first that a carriage, in the second that a horse, is not exempt from distress as being within the second of the "five sorts" enumerated by Lord Chief Justice Willes in his classical judgment in *Simpson* v. *Hartopp*. The case as to the carriage is *Francis* v. *Wyatt* (1765, 1 W. Bl. 483, 485), in which Lord Mansfield presided, and it was held that the carriage was distrainable "upon the ground of its being part of the profits of the premises, which distinguishes it from the case of goods sent to be manufactured." This was followed by the Court of Common Pleas in *Parsons* v. *Gingell* (1847, 4 C.B. 545), where the horse only was seized, but *Francis* v. *Wyatt* was treated as a binding authority on the question of horses and carriages at livery, and it was held that the horse was distrainable as having been sent to the stables to be kept there, and not merely fed and groomed.

In the year 1865 it was held by the Court of Common Pleas that goods deposited as a pledge with a pawnbroker could not be distrained by the pawnbroker's landlord: (*Swire* v. *Leach*, 11 L.T. Rep. 680; 18 C.B.N.S. 479.) Chief Justice Erle said there was no difference between the case of a pawnbroker and that of a wharfinger, factor, or warehouse keeper; he also observed that "many Judges have attempted to lay down a rule which should embrace all the exemptions, but no very well-defined principle is to be found in any of the cases." A few years afterwards the Court of Queen's Bench had to decide whether household furniture stored in a warehouse was distrainable for rent due by the warehouseman, and it was held to be exempt, on the ground that the principle applicable to a pawnbroker's business applied, and *Swire* v. *Leach* (*sup.*) was followed: (*Miles* v. *Furber*, 27 L.T. Rep., 756; L. Rep., 8 Q.B. 77.) But some observations were made on the case of horses and carriages at livery and the decision in *Parsons* v. *Gingell* that these were not exempt from distress.

Sir James Cockburn, after saying that the principle of a pawnbroker's business and the decision in *Swire* v. *Leach* applied exactly in the case before the court, observed: "I am inclined to think that the case of a horse and carriage at livery must be taken as trenching upon this principle; at all events, if the two cases in the Court of Common Pleas are not reconcilable, I prefer to abide by the later case, *Swire* v. *Leach*." Mr. Justice Mellor also, after referring to the exemption from distress in general of "goods received in the course of a particular trade to be dealt with in accordance with that trade by a tenant of premises," said: "There are cases somewhat to the contrary, such as that of a horse and carriage at livery." Thus, the case of horses and carriages at livery was treated as an exception that had been recognised, and the Court of Queen's Bench did not, though disapproving of the exception, purport to overrule the decisions under which these were held to be distrainable.

If the cases of *Francis* v. *Wyatt* (*sup.*) and *Parsons* v. *Gingell* (*sup.*) are to be regarded as still law with respect to horses and carriages, the courts in England, when called upon to decide whether motor-cars in a garage are distrainable or not, will be confronted with the alternatives of following the principle, so often enunciated by Lord Kenyon, of *stare decisis*, or treating a motor-car as essentially different from a carriage in a livery stable, and so not within the exception sanctioned by *Parsons* v. *Gingell*. Should *Francis* v. *Wyatt* and *Parsons* v. *Gingell* be held to be no longer good law, the difficulty, of course, disappears, and, in the event of horses and carriages not being distrainable, there can hardly be any doubt that motor-cars would equally be held exempt.

The question has recently arisen in an Australian case, and the Supreme Court of New South Wales has formally decided that a motor-car standing in a garage is not distrainable: (*Mackenzie* v. *Shrimpton*, 1918, 18 State Reports, 311.) The court proceeded on the view that the decision in *Miles* v. *Furber* (*sup.*) is "quite irreconcilable with" *Parsons* v. *Gingell* (*sup.*), and the "reasons given in *Miles* v. *Furber* are much more satisfactory than those in *Parsons* v. *Gingell*." The case of a motor-car is aptly brought within the second of the "five sorts" of exemptions in *Simpson* v. *Hartopp* by the following concluding words of one of the New South

Wales judgments: "The keeping of the garage was in the nature of a public trade, and . . . the car in question was delivered to the keeper of the garage as exercising and carrying on a public trade, to be managed by him in the way of his trade, and as such was privileged from distress." This Australian decision is a valuable contribution to the case law on motor-cars, even if the English courts of first instance feel bound by the decisions of 1765 and 1847 to class motor-cars with horses and carriages as still liable to distress.—*Law Times.*

JUDGES AND WRITTEN OPINIONS.

The following observations from the *Central Law Journal* may be perused with profit:—

"Much complaint has been made of recent years concerning the undue length of the written opinion, and yet in the demand for brevity there is a hidden danger. A much greater danger lies in the demand that only in exceptional cases shall opinions be written at all. Much of the delay and expense of the law, insofar as appellate courts are concerned, is no doubt due to the written opinion. Yet on the carefully prepared opinion depends not only the orderly growth of the law, but its unswerving righteousness. The written opinion, indeed, is the result of the desire for a government by law and not by men, and for a government by principle and reason and not by prejudice and passion. This fact even practising lawyers often fail to recognize. The digest-making law book writer realizes it but little and the general public not at all. The public knows nothing of the duties and responsibilities of the appellate court judge. It believes him to be possessed of Solomon-like opportunities and expects him, like Solomon, to decide cases off the bat and with regard merely to his momentary conception of their particular equity. It has no realization of the fact that each appellate court decision becomes a precedent and the guiding rule for those of other similar controversies; that the body of our law always has been, and, unless we radically change our governmental system, always will be judge rather than legislature made; that the lawsuit is the exception and not the rule; and that, as a rule, it is only the cases of doubt that are appealed; that one appellate court case rightly decided and carefully and thoughtfully expressed furnishes a rule of a public and business conduct which if observed will prevent numerous other controversies. The thoughtless observer and the ordinary judicial critic, indeed, desire a government by men when, as a matter of fact, our whole legal structure and the permanence of democracy demands and depends upon a government by law."

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

INSURANCE (MARINE)—POLICY ON CARGO—"WARRANTED FREE FROM ALL CONSEQUENCES OF HOSTILITIES"—DAMAGE CAUSED BY INFERNAL MACHINE PLACED IN SHIP'S HOLD BY GERMAN—EVIDENCE OF AGENCY FOR GERMAN GOVERNMENT—LIABILITY OF INSURER.

Atlantic Mutual Insurance Co. v. *King* (1919) 1 K.B. 307. This was an action on a policy of re-insurance on a cargo carried on a ship from Bahia to New York. It contained a clause: "Warranted free from all consequences of hostilities or warlike operations whether before or after the declaration of war." A German subject surreptitiously placed an infernal machine in the hold of the vessel which exploded and set the ship on fire and burnt part of the cargo. The question Bailhache, J., had to decide was, whether this was a consequence "of hostilities or warlike operations," or was to be attributed merely to the wrongful act of an irresponsible individual? It was proved that by order of the Naval General Staff of Germany to the naval attachés, that they were required to mobilise all destruction agents in ports where munitions were being loaded on ships going to England, France, Canada, or the United States of North America, and to hire persons for arranging explosions on board ships bound for enemy countries; and that funds for hiring and bribing persons would be placed at their disposal by the Secret Service Division of the Naval Staff. The learned Judge came to the conclusion that, although the German did not appear to have received an iron cross, or other express ratification of his act, he was nevertheless the agent of the German Government. He therefore came to the conclusion that the explosion was the result of "warlike operations," and therefore that the loss was not covered by the policy.

FIRE—LIABILITY FOR DAMAGE TO ADJOINING PREMISES—"ACCIDENTAL FIRE"—NEGLIGENCE IN NOT CHECKING SPREAD OF FIRE—FIRES PREVENTION ACT, 1774 (14 GEO. III., c. 78), s. 86—(R.S.O. c. 118).

Musgrave v. *Pandelis* (1919) 1 K.B. 314. This was an action to recover damages caused by a fire spreading from the defendant's premises. The defence was that the fire "accidentally began" on the defendant's premises and that therefore under the Fires Prevention Act, 1774 (see R.S.O. c. 118) the defendant was not liable. The facts were that the plaintiff was possessed of furnished rooms situate over a garage occupied by the defendant and in which he

kept a motor-car. The defendant's servant was engaged in cleaning the car and for that purpose it was necessary to move it, and as he could not move it himself, he started the engine, when, from some unexplained cause, the petrol in the carburettor caught fire. If the servant had at once turned off the tap of the pipe leading to the petrol tank, the small quantity of petrol in the carburettor would have speedily burnt itself out, and no damage would have been done to the plaintiff. He neglected to do this and the petrol in the tank caught fire, and the fire spread to the body of the car and the garage with the plaintiff's rooms over it, with their contents were destroyed. Lush, J., who tried the action, found as a fact that the fire which broke out in the carburettor was accidental, in the sense that it was not the result of a wilful act, or of negligence, but he found that the defendant's servant was guilty of negligence in omitting to turn off the tap promptly, and he held that in these circumstances the defendant was not protected by the statute, because, even assuming that the fire which began in the carburettor caused the damage, it was not "accidental" within the meaning of the statute, because a person using a dangerous thing like a petrol engine, the carburettor of which is not unlikely to get on fire when the engine is started, cannot be heard to say that the fire was "accidental" within the statute, even though he was not guilty of negligence. Because the rule is that he must keep such a thing under control at his peril. And, secondly, because a fire "begins" within the meaning of the statute only when the flames get out of control; and, therefore, the "fire" in this case began when the body of the car caught fire, and in that sense the efficient cause of it was not the initial fire in the carburettor, but the negligence of the servant in not turning off the tap, and therefore it was not the "fire" which burnt the plaintiff's property which "accidentally" began.

PRIZE COURT—CONTRABAND—INNOCENT SHIPPERS—ULTIMATE ENEMY DESTINATION.

The Noordam (1919) P. 57. This was a prize case. The goods in question were absolute contraband shipped from New York to Amsterdam. The nominal consignees were the Netherlands Oversea Trust Co., who had an agreement with the British Government to prevent as far as they could any of the cargoes consigned to them from reaching enemy countries. In this case they were acting for a Dutch firm of De Vries. This firm was engaged in shipping goods received by it to Germany, which fact they endeavoured to conceal from an English accountant who was appointed to examine their books by falsifying and fabricating their accounts. When the goods were seized the buyers refused to pay, and in the present proceedings the consignors were the

claimants. In these circumstances the Court (Lord Sterndale, P.P.D.) held that it was immaterial that the claimants were innocent of any intention to ship the goods to an enemy country—that the doctrine of "continuous voyage" applied, and that in this case notwithstanding the agreement of the Netherlands Oversea Trust Co., the Court was justified in assuming that the ultimate destination of the goods was intended to be an enemy country if the buyers could succeed in evading the restrictions that the company imposed. The goods were therefore condemned.

MORTGAGE — LEASEHOLD — FIXTURES — MORTGAGE OF LEASEHOLD WITH FIXTURES ATTACHED—SALE BY MORTGAGEE—SEVERANCE OF FIXTURES.

In re Rogerstone Brick & Stone Co., Southall v. *Westcomb* (1919) 1 Ch. 110. In this case a company had issued debentures secured by a floating charge on all of its assets, subject to a proviso that the company should not create any mortgage to have priority thereto. Any debenture holder was empowered to appoint a receiver with power to make arrangements in the debenture holders' interests. The company requiring money, the debenture holders agreed to the creation of a mortgage on the leasehold premises of the company to have priority over the charge. Accordingly, the leasehold premises with fixtures attached were assigned by way of mortgage for the residue of the term. The business of the company not succeeding the mortgagee, who was also a debenture holder, appointed a receiver for the debenture holders, who eventually closed down the works, and an arrangement was thereafter made between the mortgagee, who was a solicitor, and the receiver for the latter to offer the loose and fixed plant together for sale, the proceeds of the former to go to the debenture holders, and of the latter to the mortgagee. The action was brought by a debenture holder who claimed that the whole of the proceeds should go to the debenture holders in priority to the mortgagee. Younger, J., who tried the action, dismissed the action, holding that the company's interest in the fixtures as mortgagor continued only so long as it had an interest in the term, and ceased on a sale by the mortgagee; that the right which the mortgage carried to remove the fixtures did not render it obnoxious to the Bills of Sales Act so as to make it void for non-registration thereunder; that the receiver was under no obligation to insist that the removal of the fixtures by the mortgagee should be delayed until the end of the term; and, lastly, that the arrangement come to between the receiver and the mortgagee was beneficial to the debenture holders, and that the mortgagee had gained no undue advantage; and the Court of Appeal (Eady, M.R., Duke, L.J., and Eve, J.) affirmed his decision. It may be observed that the case seems to some extent to have turned on the fact that the mortgage was by

assignment of the lease which carried the fixtures, and that the result might possibly have been different if the mortgage had been by way of sub-lease. The plaintiff relied on the case of *Re Yates*, 38 Ch. D. 112, where it was laid down that a mortgagee of premises on which there are trade fixtures, has no right to sever them and sell them separately from the property to which they are affixed, and it was argued that if he does sever them they immediately revert to the mortgagor. But Eady, M.R., as to that said that the mortgagee had the right to the fixtures, and if he improperly severed them to the prejudice of the mortgagor he might be answerable for the damage so occasioned, but that was all.

MARRIAGE—DECEASED WIFE'S NIECE—VALIDITY—DECEASED WIFE'S SISTER MARRIAGE ACT 1907 (7 EDW. VII. c. 47)—(R.S.C., c. 105, s. 2).

In re Phillips, Charter v. *Ferguson* (1919) 1 Ch. 128. This was a summary application by originating summons on behalf of the administrator of an estate, to have it determined whether the marriage of a man to his deceased wife's niece is valid. It was admitted that the marriage with an aunt or uncle's wife was expressly prohibited, and that the Ecclesiastical Courts held that marriage with a wife's niece was prohibited by parity of reason; but it was claimed that as the statute of 1907 had removed the prohibition of marriage with a deceased wife's sister, it had impliedly removed the prohibition of marriage with a deceased wife's niece, who was one degree further off. Astbury, J., who heard the application, refused to give effect to this argument, and held that the marriage was within the prohibited degrees and therefore under the Marriage Act, 1835 (5-6 W. IV. c. 54) absolutely null and void. This is another instance of the necessity for a uniform marriage law for the whole Empire. Here we have a marriage declared unlawful in England, and a Canadian statute, R.S.C., c. 105, declaring that in Canada such a marriage is not invalid. And it also manifests the unsatisfactory character of the tinkering method of legislation. A marriage with a deceased wife's sister is made legal, and a marriage with a deceased husband's brother remains illegal, although by parity of reason both stand on the same footing. Then we have a marriage with a deceased wife's niece, though invalid in England, declared to be valid in Canada, but marriage with a deceased husband's nephew still remains unlawful, though both, by parity of reason, are on the same footing. How far the Parliament of Canada has authority to alter the Imperial legislation on this subject, even as far as Canada is concerned, in view of the Colonial Laws Validity Act, remains still to be decided.

ACCUMULATIONS—GENERAL RESIDUARY BEQUEST—ACCUMULATIONS BEYOND 21 YEARS—ACCUMULATIONS ACT, 1800 (39-40 GEO. III., c. 98)—(R.S.O., c. 110, s. 2).

In re Garside, Wragg v. *Garside* (1919) 1 Ch. 132. In this case a testator had devised certain real estate to his trustees on trust to apply a competent part of the income for the maintenance of his son Abraham, and, subject to certain provisions for the children of Abraham in case he had any, which he did not—he directed the estate to be held subject to the uses of his residuary estate, and he directed that his residuary estate should be applied in payment of debts and funeral expenses and legacies and certain annuities until his youngest child attained 21 and to accumulate the surplus income, and on his youngest child attaining 21 he devised and bequeathed his residuary estate to his son Frederick for life, and after his death to his children. Abraham died in 1918, and during his life part of the income of the estate first mentioned was applied for his maintenance and the surplus accumulated. The testator died in 1893, and the youngest son attained 21 in 1896. The accumulations at Abraham's death amounted to £12,000, and the question was who was entitled thereto. Astbury, J., who heard the application, held that the accumulations for a period of 21 years after the testator's death formed part of the capital of the residuary estate; but that the subsequent accumulations being subject to the Accumulations Act (39-40 Geo. III., c. 98) (R.S.O., c. 110, s. 2) were income and belonged to the tenant for life.

WILL—CONSTRUCTION—GIFT TO THREE AND TO THE "SURVIVORS OR SURVIVOR."

Powell v. *Hellicar* (1919) 1 Ch. 138. A nice little problem of construction was presented to Younger, J., in this case. A testatrix who died in 1858 gave her residuary estate to trustees upon trust for her nephew Charles and her two nieces Catharine and Mary for their respective lives only, and after their respective deaths then in trust for their respective children who should attain 21 or die under that age leaving issue, such last mentioned child or children taking *per stirpes* and not *per capita* and in case either of the nephew or nieces should die without leaving a child or children then the share of each of them so dying "shall from time to time go to the survivors or survivor in like manner as hereinbefore provided in regard to their original share or shares," and, subject to the trusts thereinbefore declared, the testatrix gave her residuary estate to one Hassell who predeceased the testatrix.

The nephew Charles died in 1882 without issue; Mary died in 1900, leaving three children who attained 21. Catharine died in 1917, a spinster. The question therefore arose who was entitled to Catharine's share; and this depended on the meaning to be placed on the words "survivors or survivor." The children of Mary claimed to be entitled to her original share as also the ⅛ which had devolved on Catharine on the death of Charles, notwithstanding that their mother had not survived Catharine. Their claim was contested by the next of kin (the report does not say of whom), probably of the testatrix, and of Catharine. The learned Judge held that, having regard to the context, the words "survivors or survivor" ought not to be construed literally but rather as meaning "other," as to construe them literally would have the effect of defeating the intention of the testatrix, the children of Mary were therefore held entitled to the fund.

GIFT OF CHATTELS INTER VIVOS—CHATTELS IN THE ACTUAL POSSESSION OF INTENDED DONEE—PAROL GIFT BY DONOR—DONEE APPOINTED EXECUTOR—CONFIRMATION BY WILL.

In re Stoneham; *Stoneham* v. *Stoneham* (1919) 1 Ch. 149. In this case a testator had two residences, one at Brighton and the other at a place called Beredens. At the latter place he had a quantity of old oak furniture, arms and armour. In February, 1910, the plaintiff with the consent of the testator went with his family to reside at Beredens, where he was visited from time to time by the testator, who generally resided at Brighton. The plaintiff alleged that in 1913 the testator when on a visit to Beredens verbally gave him the old oak furniture, arms and armour. He subsequently made his will in 1914, which, after confirming the gift he had made to the plaintiff "of the furniture and effects in his possession at Beredens," gave "all his furniture and effects . . . or such of them or parts thereof as he might not have given away to his executors" upon certain trusts and appointed the plaintiff one of his executors. The question at issue was whether in the circumstances there had been a complete gift of the chattels above referred to to the plaintiff. Lawrence, J., held that there had, and that the parol gift of the chattels in the actual possession of the donee needed no further act of delivery to complete the gift; and that the same principle applied though the gifts were in the donee's possession as bailee at the time of the gift.

COMPANY—QUORUM OF DIRECTORS—INTERESTED DIRECTOR—ONE TRANSACTION, TWO RESOLUTIONS—RESOLUTION REDUCING QUORUM.

In re North Eastern Insurance Co. (1919) 1 Ch. 198. This was a summary application in a winding-up proceeding to determine whether or not certain debentures, issued by the company in liquidation, were validly issued. By the Articles of Association of the company, no director was to be disqualified from contracting with the company, but no director interested in any such contract should be entitled to vote respecting the contract. The articles also provided that the directors might determine the quorum necessary for the transaction of business. Two of the directors, Young and Dobbie, made certain advances to the company, and at a board meeting, after referring to these advances having been made in consideration of debentures being issued as thereafter mentioned, a resolution was passed authorizing the issue of a debenture for £351 to Young who did not act or vote in relation to this resolution; and a second resolution was passed authorizing the issue of a debenture for £950 to Dobbie who did not act or vote in relation to this resolution. These debentures were issued accordingly, and were made equally a floating charge on the company's property, and authorized the holder to appoint a receiver, the moneys to be received to be applied *pari passu* on both debentures. Lawrence, J., held that the issue of the two debentures was one transaction in which both Young and Dobbie were equally interested, and that the resolutions were void for want of a disinterested quorum. At another board meeting at which all the directors were present except Dobbie, a resolution was passed for the issue of a debenture to Dobbie for £2,000 as security for all moneys due to Dobbie and Young not exceeding that sum. It did not clearly appear whether or not Young took any part in relation to this resolution, but evidence was offered that at the same meeting a previous resolution had been passed that the quorum of directors should be reduced to two. Lawrence, J., held that these resolutions were also invalid for want of a disinterested quorum; and that, even assuming the resolution for the reduction of the quorum had been passed, it was invalid because it was not passed in the interest of the company, but solely to enable Young and Dobbie to obtain an interest in the company's property. He says: "In my opinion the vote of the interested director in favour of a resolution to alter the quorum for such a purpose, really comes to the same thing as a vote by him in favour of the resolution conferring the interest on himself."

Reports and Notes of Cases.

Province of Manitoba.

COURT OF APPEAL.

Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A., and Curran, J.] [45 D.L.R.

REIMER v. ROSEN.

Contract—Sale of land—Breach—Penalty or liquidated damages—Construction.

The question whether a sum mentioned in an agreement to be paid for a breach is to be treated as a penalty or as liquidated and ascertained damages is a question of law to be decided by the court upon a consideration of the whole instrument.

Leach, K.C., and *Sutton*, for plaintiff; *Andrews*, K.C., and *Burbidge*, K.C.

ANNOTATION ON ABOVE CASE FROM 45 D.L.R.

Penalties and Liquidated Damages in Contracts.

In cases where there is added to the contract a clause for the payment of a sum of money in the event of non-performance, the question arises whether the contract will be satisfied by its payment, or whether it will not. In the former case, equity will not interfere; in the latter it may.

The question always is, What is the contract? Is it that one certain act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of this very act? or is it that one of two things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penal or other like sum being annexed will not prevent the court's enforcing performance of the very act, and thus carrying into execution the intention of the parties: *Howard* v. *Hopkyns* (1742), 2 Atk. 371, 26 E.R. 624; *French* v. *Macale* (1842), 2 Dr. & War. 269; *Roper* v. *Bartholomew* (1823), 12 Pri. 797, 147 E.R. 880. If the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceeding against the party having the election to compel the performance of the other alternative.

Contracts of the kind now under discussion may be divisible into three classes:—

(i.) Where the sum mentioned is strictly a penalty—a sum named by way of securing the performance of the contract, as the penalty in a bond:

(ii.) Where the sum named is to be paid as liquidated damages for a breach of the contract:

(iii.) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

Where the stipulated payment comes under either of the two first-mentioned heads, the court will enforce the contract, if in other respects it can and ought to be enforced, just in the same way as a contract not to do a particular act, with a penalty added to secure its performance or a sum named as liquidated damages, may be specifically enforced by means of an injunction against breaking it. On the other hand, where the contract comes under the third head, it is satisfied by the payment of the money, and there is no ground for the court to compel the specific performance of the other alternative of the contract. "There are," said Lord Bramwell, in *Legh* v. *Lillie* (1860), 6 H. & N. 165, 171, 158 E.R. 69; "three classes of covenants; first, covenants not to do particular acts, with a penalty for doing them, which are within the 8 & 9 Wm. III., c. 11: secondly, covenants not to do an act, with liquidated damages to be paid if the act is done, which are not within the statute: and thirdly, covenants that acts shall not be done unless subject to a certain payment." It will be convenient to consider the three classes of cases separately.

A penalty (strictly so called) attached to the breach of the contract will not prevent it from being specifically enforced.

"The general rule of equity," said Lord St. Leonards, in *French* v. *Macale*. 2 Dr. & War. 274-5, "is that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. If a man, for instance, agree to settle an estate and execute his bond for £600. as a security for the performance of his contract, he will not be allowed to pay the forfeit of his bond and avoid his agreement, but he will be compelled to settle the estate in specific performance of his agreement. (The case referred to seems to be *Chilliner* v. *Chilliner* (1754), 2 Ves. Sen. 528, 28 E.R. 337.) So if a man covenant to abstain from doing a certain act, and agree that if he do it he will pay a sum of money; it would seem that he would be compelled to abstain from doing that act, and, just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract."

Thus, where two persons entered into articles for the sale of an estate, with a proviso that, if either side should break the contract, he should pay £100 to the other, and the defendant, by his answer, insisted that it was the intention of both parties that, upon either paying £100, the contract should be absolutely void, Lord Hardwicke nevertheless decreed specific performance of the contract to sell. *Howard* v. *Hopkyns*, 2 Atk. 371. In another case, the condition recited a contract for a settlement comprising a sum of money and also real estate: the penalty was double this sum of money, but had no relation to the real estate: the court granted specific performance of the contract embodied in the condition. *Prebble* v. *Boghurst* (1818), 1 Swans. 309, 36 E.R. 402. And where a father, in consideration of his daughters giving up a part of their interest in the property, agreed to make up their incomes arising out of it to £200 a year, and entered into a bond for the payment of such sum as

might be needful for that purpose, and the bond recited the contract, the court took this as evidence of the contract, and accordingly granted relief on the foot of it beyond the bond, *Jeudwine* v. *Agate* (1829), 3 Sim. 129, 57 E.R. 948; and in a case which went to the House of Lords, a contract (contained in the condition of a bond) to give certain property by will or otherwise, was held not to be satisfied by the penalty, but was specifically performed: *Logan* v. *Wienholt* (1883), 7 Bli. N.S. 1, 5 E.R. 674. See also *Butler* v. *Powis* (1845), 2 Coll. 156, 63 E.R. 679; *National Provincial Bank of England* v. *Marshall* (1888), 40 Ch. D. 112.

So, again, a contract not to carry on a particular kind of business within certain limits expressed in the condition to a bond can be enforced by injunction: *Clarkson* v. *Edge* (1863), 33 Beav. 227, 55 E.R. 354; *Gravely* v. *Barnard* (1874), L.R. 18 Eq. 518; *cf. William Robinson & Co.* v. *Heuer*, [1898] 2 Ch. 451, at 458.

The difference between penalty and liquidated damages is, as regards the common law remedy, most material. For, according to common law, if the sum named is not a penalty, but the agreed amount of liquidated damages, the contract is satisfied either by its performance or the payment of the money: *Anon.*, (1737), Hard. 390, 95 E.R. 252; *Lowe* v. *Peers* (1768), 4 Burr. 2225, 98 E.R. 160; *Hurst* v. *Hurst*, 4 Ex. 571; *Legh* v. *Lillie*, 6 H. & N. 165; *Mercer* v. *Irving* (1858), El. Bl. & E. 563, 120 E.R. 619; *Atkyns* v. *Kinnier* (1850), 4 Ex. 776, 154 E.R. 1429. As to the distinction between penalty and liquidated damages, see also *Elphinstone* v. *Monkland*, 11 App. Cas. 332, 346-348; *Clydebank* v. *Castanedq*, [1905] A.C. 6, 15; *Public Works Commissioner* v. *Hills*, [1906] A.C. 368, 375; *Wallis* v. *Smith*, 21 Ch. D. 243, 249, 258; *Pye* v. *British Automobile Commercial Syndicate*, [1906] 1 K.B. 425; *Diestal* v. *Stevenson*, [1906] 2 K.B. 345, 350; and *General Billposting Co.* v. *Atkinson*, [1908] 1 Ch. 537, at 544. But as regards the equitable remedy the distinction is unimportant: for the fact that the sum named is the amount agreed to be paid as liquidated damages is, equally with a penalty strictly so called, ineffectual to prevent the court from enforcing the contract in specie: *City of London* v. *Pugh* (1727), 4 Bro. P.C. 395, 2 E.R. 268; *French* v. *Macale*, 2 Dr. & War 269; *Coles* v. *Sims* (1854), 5 De G. M. & G. 1, 43 E.R. 768; *Carden* v. *Butler* (1832), Hayes & J. 112; *Bird* v. *Lake* (1863), 1 H. & M. 111, 71 E.R. 49; *cf. Bray* v. *Fogarty* (1870), Ir. R. 4 Eq. 544.

The simplest illustration of this is the ordinary case of a stipulation on the sale of real estate that if the purchaser fail to comply with the condition he shall forfeit the deposit, and the vendor shall be at liberty to resell and recover as and for liquidated damages the deficiency on such resale and the expenses. "A purchaser," said Lord Eldon in *Crutchley* v. *Jerningham* (1817), 2 Mer. 502, at 506, 35 E.R. 1032, "has no right to say that he will put an end to the agreement, forfeiting his deposit." *Cf. Long* v. *Bowring* (1864), 33 Beav. 585, 55 E.R. 496. Such a condition has never been held to give the purchaser the option of refusing to perform his contract if he choose to pay the penalty, nor to stand in the way of specific performance of the contract.

In *French* v. *Macale*, 2 Dr. & War. 269, Lord St. Leonards fully discussed the law as to compelling the performance of contracts of the kind under discussion. In that case there was a covenant in a farming lease "not

to burn or bate the demised premises or any part thereof under the penalty of £10 per acre to be recovered as the reserved yearly rent for every acre so burned." His Lordship appears to have considered this increased rent as in the nature of liquidated damages and not a penalty, but nevertheless he granted an injunction against the burning, saying after a careful review of the authorities that in every case of this nature the question is one of construction, and that the court will always interfere unless there is evidence of an intention that the act is to be permitted to be done on payment of the increased rent.

In one case a deed was executed dissolving a partnership between H. and L., and containing a recital that it had been agreed that the deed should contain a covenant by L. not to carry on the trade within one mile from the old place of business "without paying to H., as or by way of stated or liquidated damages," a sum named. In a subsequent part of the deed there was an absolute covenant not to carry on the trade within that limit, followed by a proviso that if L. should act contrary to or in infringement of that agreement he would immediately thereupon pay to H. the sum of £1,500 by way of liquidated damages. Notwithstanding the recital and the form used, it was held that L. was not entitled to break the covenant on paying the £1,500, and an injunction was granted: *Bird* v. *Lake*, 1 H. & M. 111.

The same view was put forward, though perhaps in slightly different language, by the Lords Justices in *Coles* v. *Sims*, 5 De G. M. & G. 1. That was a case in which there were mutual covenants between a vendor of part of his land and the purchaser of that part as to building on the sold and unsold parts, with a stipulation for payment of liquidated damages in case of breach of covenant. On an application for an interim injunction (which was granted), Knight Bruce, L.J., said (5 De G. M. & G. 1, at 9): "If I were now deciding the cause, I should probably come to the conclusion that in a case where a covenant is protected (if I may use the expression) by a provision for liquidated damages, it must be in the judicial discretion of the court, according to the contents of the whole instrument and the nature and circumstances of the particular instance, whether to hold itself bound or not bound upon the ground of it to refuse an injunction if otherwise proper to be granted: and that in the present case, the circumstances are such as to render it right for the court to grant an injunction." Turner, L.J., p. 10, added: "The question in such cases, as I conceive, is, whether the clause is inserted by way of penalty or whether it amounts to a stipulation for liberty to do a certain act on the payment of a certain sum."

Where the contract to do or not to do the act is distinct from the obligation to pay a sum of money, it seems that either the contract or the obligation may be sued on.

"Where a person," said Lord Romilly, M.R., in *Fox* v. *Scard* (1863), 33 Beav., 327, at p. 328, 55 E.R. 394, "enters into an agreement not to do a particular act and gives his bond to another to secure it, the latter has a right at law and equity, and can obtain relief in either, but not in both courts."

It is clear that the fact that the contract may be comprised in a bond does not of itself import any election to pay the money and refuse to do the

act: *Hobson* v. *Trevor* (1723), 2 P. Wms. 191, 24 E.R. 695; *Chilliner* v. *Chilliner*, 2 Ves. Sen. 528; *Clarkson* v. *Edge*, 33 Beav. 227. "The form of marriage articles by bond does not import election": *Roper* v. *Bartholomew*, 12 Pri. 797.

In the third class of contracts, which may be distinguished as alternative contracts, the intention is that a thing shall be done or a sum of money paid at the election of the person bound to do or pay.

In these cases the contract is as fully performed by the payment of the money as by the doing of the act, and therefore where the money is paid or tendered there is no ground for interference by way of specific performance or injunction.

The question to which of the three foregoing classes of contracts any particular one belongs is of course a question of construction. In considering it "the court must, in all cases, look for their guide to the primary intention of the parties, as it may be gathered from the instrument upon the effect of which they are to decide, and for that purpose to ascertain the precise nature and object of the obligation": *Roper* v. *Bartholomew*, 12 Pri. 797, at 821. Consequently each case depends on its own circumstances, but it may be noticed that "a court of equity is in general anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, and not as a sum of money really intended to be paid": *Per* Lord Cranworth in *Ranger* v. *Great Western R. Co.* (1854), 5 H.L. Cas. 94, 10 E.R. 824; *Astley* v. *Weldon*, 2 Bos. & Pul. 346; and that, "on the other hand, it is certainly open to parties who are entering into contracts to stipulate that on failure to perform what has been agreed to be done, a fixed sum shall be paid by way of compensation": *Ranger* v. *Great Western R. Co.*, 5 H.L. Cas. 94.

On this question it is by no means conclusive that the contract may be alternative in its form, for nevertheless the court may clearly see that it is essentially a contract to do one of the alternatives: so that where there was a contract to renew a certain lease, with an addition of three years to the original term, or to answer the want thereof in damages, the court decreed specific performance of the lease, the second alternative only expressing what the law would imply: *Finch* v. *Earl of Salisbury*, Finch, 212.

The largeness or smallness of the sum named is no reason for considering it a mere penalty, unless that be the apparent intention: *Roy* v. *Duke of Beaufort* (1741), 2 Atk. 190, 26 E.R. 519; *Astley* v. *Weldon*, 2 Bos. & Pul. 346; *French* v. *Macale*, 2 Dr. & War. 269. But see *Burne* v. *Madden* (1835), Ll. & G. *t.* Plunk. 493; but where the amount of the penalty is small, as compared with the value of the subject of the contract, it has been considered a reason for treating the sum reserved as a mere penalty, and not in the nature of an alternative contract: *Chilliner* v. *Chilliner*, 2 Ves. Sen. 528.

In a case where a man, being very uncertain what estate he should derive from his father, entered into a bond in £5,000, on the marriage of his daughter, to settle one-third of such property, and the contract so to settle was recited in the condition of the bond, it was specifically performed in full, and not up to £5,000 only: *Hobson* v. *Trevor*, 2 P. Wms. 191. "Such agreement," said Lord Macclesfield, 2 P. Wms., at p. 192 (6th ed.), "was not to be the weaker but the stronger for the penalty."

The fact that the benefit of the contract would result to one person or

flow in one channel, and the benefit of the sum, if paid, in another, is a strong circumstance against considering the contract alternative in its nature; thus where, on a marriage, the husband's father gave a bond for the payment of £600 to the wife's father, his executors or administrators, in the penalty of £1,200 if he did not convey certain lands for the benefit of the husband and wife and their issue, Lord Hardwicke held that the obligor was not at liberty to pay the £600, or settle the lands, at his election, but compelled the specific performance of the contract to settle—partly on the ground that the £600 would not have gone to the benefit of the husband and wife and their issue, but of the wife's father and his representatives, and partly that the lands to be settled were worth much more than £600: *Chilliner* v. *Chilliner*, 2 Ves. Sen. 528; *Roper* v. *Bartholomew*, 12 Pri. 797.

Where the sum reserved is single, and the act stipulated for or against is in its nature continuing or recurring, as, for instance, particular modes of cultivating a farm, the sum will be considered as a security and not an alternative: *French* v. *Macale*, 2 Dr. & War. 269; and see *Roper* v. *Bartholomew*, 12 Pri. 797.

On the other hand, where the sum or sums made payable vary in frequency of payment or amount according to the thing to be done or abstained from, the courts have, in many cases, found that the payment is an alternative.

In *Woodward* v. *Gyles* (1690), 2 Vern. 119, 23 E.R. 686, a covenant by the defendant not to plough meadow land, and if he did, to pay so much an acre, was held not to be a fit case for an injunction restraining the ploughing: but the exact form of the covenant does not appear. "If," said Lord St. Leonards, *French* v. *Macale*, 2 Dr. & War. 284, "as in *Woodward* v. *Gyles*, 2 Vern. 119, and *Rolfe* v. *Peterson*, 2 Bro. P. C. 436, there is evidence of intention that the party is to be at liberty to do the act if he choose to pay the increased rent, of course the court cannot interfere, because this court never interferes against the express contract of the parties."

In *Rolfe* v. *Peterson*, *Ibid.*, the question was whether the payment was a penalty and so came within the doctrine of equitable relief against penalties: but of it Lord Loughborough said, in *Hardy* v. *Martin* (1783), 1 Cox, 26: "That was a case of a demise of land to a lessee to do with the land *as he thought proper:* but if he used it one way he was to pay one rent and if another way another rent." Similarly, a covenant in a farm lease not to do certain things "under an increased rent of," etc., was held to give the tenant the right to do the act on paying the increased rent: *Legh* v. *Lillie*, 6 H. & N. 165; and see *Hurst* v. *Hurst* (1849), 4 Ex. 571, 154 E.R. 1341; *Gerrard* v. *O'Reilly* (1843), 3 Dr. & War. 414; and a contract to renew perpetually "under a penalty of £70" was held alternative: *Magrane* v. *Archbold* (1813), 1 Dow, 107, 3 E.R. 639.

But where, in addition to the increased rent, there is a stipulation that the act provided against shall be a forfeiture of the covenanter's interest, the sum is held to be a security only and not an alternative: and consequently the court would restrain the doing of the act: *Barret* v. *Blagrave* (1800), 5 Ves. 555, 31 E.R. 735, as explained by Lord St. Leonards in *French* v. *Macale*, 2 Dr. & War. 278-9; and, of course, the usual form of lease giving the lessor

the right to re-enter and avoid the lease on breach of covenant offers no impediment to the enforcement of the covenants specifically: *Dyke* v. *Taylor* (1861), 3 De G. F. & J. 467, 45 E.R. 959.

Where the contract would be unreasonable unless it gives an option to the person stipulating to pay the sum, this will be a strong circumstance for treating the contract as alternative. So where a lady, administratrix of her husband, covenanted, under a penalty of £70, to renew a sub-lease as often as she obtained a renewal of the head-lease, and it appeared that the fines on the head-lease were raised on renewal, according to the then value of the property, so as to render her covenant unreasonable except upon the construction of its giving her an option, the House of Lords treated the contract as alternative: *Magrane* v. *Archbold*, 1 Dow, 107.

In the case of *Re Dagenham Dock Co.; Ex parte Hulse* (1873), L.R. 8 Ch. 1022, a company incorporated by Act of Parliament for making a dock, agreed with a land owner to purchase a piece of land for £4,000, of which £2,000 was to be paid at once, and the remaining £2,000 on a future day named in the agreement, with a provision that if the whole of the £2,000 and interest was not paid off by that day, in which respect time was to be of the essence of the contract, the vendors might repossess the land as of their former estate without any obligation to repay any part of the purchase-money.

The court held that this stipulation was in the nature of a penalty from which the company was entitled to be relieved on payment of the balance of the purchase-money, with interest,

In *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.*, [1915] A.C. 79, the appellants, who were manufacturers of motor tyres, covers and tubes, supplied these goods to the respondents, who were dealers, under an agreement whereby the respondents, in consideration of certain trade discounts, bound themselves not to tamper with the marks on the goods, not to sell or offer the goods to any private customers or to any co-operative society at less than the appellants' current list prices, not to supply to persons whose supplies the appellants had decided to suspend, not to exhibit or export without the consent of the appellants, and to pay the sum of £5 by way of liquidated damages for every tyre, cover, or tube sold or offered in breach of the agreement.

The respondents sold a tyre cover to a co-operative society below the current list price. In an action for breach of contract, it was proved that substantially the whole of the appellants' business in these articles was done through the trade; that in order to prevent underselling the appellants insisted upon all their trade customers signing agreements of this nature, and that the probable effect of underselling by any particular trade customer was to force their other trade customers to deal elsewhere. The Court of Appeal had held that this £5 agreed to be paid was a penalty: The House of Lords reversed this, holding it to be liquidated damages. The list of cases and authorities are carefully reviewed in this case.

Among the Canadian cases may be noted *Fisken* v. *Wride*, 7 Grant's Ch. 598.

Upon a contract for sale of an estate subject to a mortgage, it was stipulated that the vendor should execute a bond to save harmless and indemnify

the purchaser against the encumbrance, and a sum of £500 by way of liquidated damages for non-performance by either was to be paid to the other. The court held that this did not enable either party to repudiate the contract upon paying to the other £500, and in a suit by the vendor a reference as to title was directed, but without the usual declarations that the plaintiff was entitled to specific performance, reserving a right on the hearing on further directions to refuse specific performance in the event of the vendor's failing to effect, or endeavouring to effect an arrangement with the mortgagee, which the vendor alleged he could make. It was also held that the fact of the vendor being a partner in a mercantile firm who since the execution of the contract had made a composition with their creditors was not such an objection as could prevail against the claim to specific performance.

Kilmer v. *B. C. Orchard Lands Co.*, 10 D.L.R. 172, [1913] A.C. 319, was an appeal to the Privy Council from the British Columbia Court of Appeal. (2 D.L.R. 306.)

The question on the appeal arose out of a claim by the respondent company—an unpaid vendor of a tract of undeveloped land in British Columbia—to enforce a condition of forfeiture contained in the agreement for sale. By the terms of the agreement, the purchase-money was to be paid together with interest, by specific instalments at certain specified dates. Time was declared to be of the essence of the agreement. In default of punctual payment at an appointed date of the instalment of purchase-money and the interest then payable or any part thereof, the agreement was to be null and void and all payments made under the agreement were to be absolutely forfeited to the vendor; and the vendor was to be at liberty to sell the property immediately. The first instalment of $2,000 was duly paid on the execution of the agreement. The second instalment of $5,000 with interest as provided by the agreement was not paid on the day fixed for payment. The Privy Council held that the case was entirely within the ruling in the *Dagenham Dock* case (*supra*) and that the court should relieve against the strict letter of the contract, the arrears having been paid into court in the vendor's action brought shortly after the default for the enforcement of the forfeiture, particularly as the strict wording of the agreement would involve the right to confiscate sums of money increasing from time to time as the agreement approached completion, in case of default occurring upon subsequent instalments.

Massey v. *Walker* (1913), 11 D.L.R. 278, was a decision of the Court of King's Bench, Manitoba. The facts were as follows: The plaintiffs purchased from the defendant under an agreement of sale, the lands and premises therein described for the sum of $2,700 and made a payment of $100, being the first cash payment referred to in the said agreement, and entered into possession of the lands. The plaintiffs made default in payment of the principal and interest falling due under said agreement and by reason of the non-observance of the covenants, etc., the whole of the moneys secured by the agreement became due and payable. The court distinguished this case from *B. C. Orchards* v. *Kilmer*, 10 D.L.R. 172, in that in this case there was an express stipulation between the parties, providing and agreeing to a means by which the agreement might be put an end to. There was not an auto-

matic conclusion resulting from default, but the result of a deliberate agreement by which the mode of cancellation was arrived at. Notices of default were served according to the terms of the agreement in September, 1912, and the plaintiffs after receipt of such notices had made no move towards making their default or satisfactorily explaining their delay or asserting their right to redeem until the following March. The court held that the defendant was entitled to a declaration that the agreement had been cancelled.

Papineau v. *Guertin*, 15 D.L.R. 513, was decided by the Quebec Court of King's Bench in 1913. In this case a proprietor while he had a building in course of erection entered into a distinct contract with the builders to have work done, the doing of which caused the completion of the work originally contracted for to be delayed. The court held that he must be taken to have abandoned his right to enforce a purely penal covenant in the contract upon which he relied. The court, while realizing that the principles to be applied in the decision of the action differed from those which would be applied in English law, referred to *Public Works Commissioners* v. *Hills*, [1906] A.C. 368, and *Kilmer* v. *B. C. Orchards*, 10 D.L.R. 172.

Obituary

JOHN WINCHESTER, K.C., JUDGE OF THE COUNTY COURT OF THE COUNTY OF YORK, ONTARIO.

Judge Winchester died at his residence in Toronto, on the 8th inst., after an illness of a few months. His health had suffered from many years of hard work and assiduous attention to his arduous duties as a County Judge.

Mr. Winchester was born at Elgin, Scotland, August 27th, 1849. He came to Canada in early youth and was educated in Toronto, choosing the law as his life work, and was called to the Bar of Toronto in 1871. He served as a school trustee and alderman of the City of Toronto, and held other municipal offices. In 1882 he was appointed Registrar of the Queen's Bench Division of the High Court; and subsequently became Master in Chambers, on the death of his eminent predecessor, Mr. R. G. Dalton, Q.C., Four years later he was called inside the Bar.

Upon the death of Judge McDougall he was, in April, 1903, appointed Senior Judge of the County Court of the County of York. In this capacity he was called upon to hold a number of investigations, many of them of much interest in municipal circles.

Judge Winchester devoted himself without stint of labour and attention to the multifarious duties which pertain to the position of a County Judge. A good lawyer, of large experience of men and things, he gave great satisfaction to the public and the profession.

Bench and Bar

Law Society of Manitoba.

We are requested to make the following announcement as to persons selected to serve as Benchers of the Society for the next term of three years:—"The following persons resident and practising in the Eastern Judicial District of Manitoba, namely, Sir J. A. M. Aikins, K.C., G. W. Allan, K.C., E. Anderson, K.C., A. J. Andrews, K.C., I. Campbell, K.C., J. B. Coyne, K.C., R. W. Craig, K.C., A. E. Hoskin, K.C., W. R. Mulock, K.C., I. Pitblado, K.C., H. A. Robson, K.C., S. J. Rothwell, K.C., W. J. Tupper, K.C., C. P. Wilson, K.C., were elected as Benchers for the said term; E. A. McPherson, K.C., resident and practising in the Central Judicial District of Manitoba, was elected as a Bencher for the said term; S. E. Clement and H. E. Henderson, K.C., both resident and practising in the Western Judicial District of Manitoba, were elected as Benchers for the said term; A. W. Bowen, resident and practising in the Southern Judicial District of Manitoba, was elected as a Bencher for the said term; H. F. Maulson, K.C., resident and practising in the Northern Judicial District of Manitoba, was elected as a Bencher for the said term; and F. E. Simpson, resident and practising in the Dauphin Judicial District of Manitoba, was also elected a Bencher for the said term."

ERRATUM.

P. 129, 2nd line, for "a" read "no."

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PEACE!

The war of 1914 virtually came to an end on November 11th, 1918, when the armistice was signed by the Allies.

The Treaty of Peace, which followed in due course, was signed by representatives of the Allies and of Germany on June 28, 1919. We join with those who, in this month of July, at the King's request, voice their thanksgivings to Almighty God for victory vouchsafed and for making this awful war to cease.

It is a misnomer to speak of the elaborate document, signed in the Salon de Glaces at Versailles, as a *treaty*. It was simply, and nothing more than the expression of the views of the conquerors, as to what was best to be done, under the circumstances, to put an end, for a time at least, to the awful carnage, devastation and horrors of the most terrible war that has ever cursed humanity—so to manacle a murderous ruffian, drunk with insatiable ambition, lust of power and devilish ferocity that, for a time at least, the world might have a measure of peace—to force the wrongdoers to make some monetary amends for the awful havoc they wrought, and finally to bring to the bar of justice some of those who used war as an excuse for actual crimes, blacker, baser and more ferocious and fiendish than ever were charged in any court of justice since the world was.

This is all as it should be, but it is only a makeshift. It will do nothing for humanity in the future, and sadly little for the world in the present.

The hatred of France for Germany in 1871 (and good cause for it) is exceeded a hundredfold by Germany's hatred for France and her friends in 1919. To this is added a deep and abiding spirit of revenge, and hope for vengeance, by Germany in the years to come.

Some writers have thought that if more lenient terms had been given Germany there would have been good hope of cordial relations in the future. These writers, in our opinion, know nothing of national human nature, certainly nothing of *German* human nature. If Germany were given back all her previous territory, and released from the payment of any indemnity, the only result would be to add contempt to her hatred.

It was hoped by some that the result of the war would be to bring in a reign of true democracy and do away with militarism. The joke of this is, that the Treaty of Peace can only be carried out by force of arms! Germany signs under protest, and with the avowed intention of making this so-called Treaty another "scrap of paper" when her chance comes.

The spirit of Bolshevism, now rampant in Russia and other parts of Europe, and incipient here and elsewhere, is a poison latent in human nature all the world over. There is no cure for it, and when conditions foster its development the plague breaks out and does its deadly work. When that time fully comes (it has not come yet) there may be an alliance between Bolshevism and German militarism (in essence the same) which will make the people of that day wish they had lived in the more peaceful days of 1914-1919. There are those who look for such worse times because they say they find it in the "sure word of prophecy."

They may be right or may be wrong, but it is not in our province to argue the point. Every lawyer, however, has to do with history and precedents, and to those of them who read history honestly and carefully, and take time to judge of the future from the past, we assert, without fear of contradiction, that history (which gives the story of the past, from the day when Cain murdered Abel, until a heartless German sailor drowned the women and children on the "Lusitania" and a brutal German soldier murdered Edith Cavell) proves conclusively that there can be no peace for this sin-cursed Earth until someone comes with superhuman power as the Prince of Peace.

We are told that such a One is coming, and that "He shall reign in righteousness" and "shall rule the nations with a rod of iron." We trust that this may be so, for a torn and weary world longs for millenial rest and peace.

WILD BEAST HUNTING IN CANADA.

The strange ignorance or apathy or fear of taking action (whichever it may be) which has possessed the authorities in relation to the spread of Bolshevism in Canada, has been the surprise of thinking people for a long time past. In ancient days when judgments were falling upon Egypt for her treatment of an oppressed people, the thinking men of that day came to Pharaoh, and said, "Know you not that Egypt is destroyed." He had been living in a fool's paradise. There are those who have warned those responsible for the administration of justice that agents of the "wild beast" which destroyed Russia, and still menace the world's civilization, is with devilish energy and cunning, seeking the destruction of this once peaceful and contented country, which we fondly hoped was safe in its isolation and its distance from the centre of the whirlwind. It almost looks as though worse things are coming, if there is delay in checking the plague that is upon us.

We are all glad that some action has at last been taken in Winnipeg, in the right direction, and we trust it may not stop there. It is no time to be mealy-mouthed or apologetic when firebrands are being thrown into the inflammable material that abounds in these days of unrest. Those who throw them must be put where they can do no further harm.

It may be that some innocent persons may temporarily suffer with the guilty; but that cannot be helped, and must be endured for the general benefit. It is not desirable under present circumstances to quote as appropriate the merciful saying of our criminal law that it is better that ten suspected criminals should go free, rather than that one innocent man should suffer. This suffering in connection with the matter in hand would soon be remedied and could be compensated. Socialists and union men are in bad company just at present, and it is up to them to realize this and "stand from under." We do not believe, however, that the honest men of the classes referred to, or the working men who do not belong to either class, are in sympathy with Bolshevism, as we now use that word, and they do in fact

repudiate its monstrous doctrines. In truth capital and labour should join forces to hunt and destroy the "wild beast." The aim of the Bolshevist is the same as was the aim of Germany; the control of the world for their own aggrandizement, and must be put down with the same firm hand. Its potency lies in the fact that human nature is the same in every country and in every century. The natural heart of man is, we are told, "only evil continually" and "deceitful above everything and desperately wicked"; and when the restraints of civilization and religion are removed, and the stern administration of justice wanes, it shews itself as the merciless, masterful monster it really is.

It is unnecessary to go into details. The daily papers tell us enough without making enquiries from government detectives, or secret service men. Probably if the public knew all they do, the present surprise at the hitherto inaction of the Government would increase.

Emphasizing what we have said on this subject, there comes to us from the Department of Public Inspection at Ottawa the report of the British Government on "Bolshevism in Russia." It is a piteous and revolting tale. The atrocities there spoken of, and the equally horrible villainies of the German wild beasts would, if there were no other side to the picture, make a man ashamed of his species. The following is the Department's introduction to the report:—

"The collection of reports printed in the accompanying pamphlet tell the story of the great Russian tragedy from the commencement of Bolshevist rule to April of the present year. It furnishes convincing evidence of the murders and massacres that have gone hand in hand with the regime of Lenine and Trotsky. It records these crimes with full particulars of time, place and names of victims. The report also records the state of utter demoralization which prevails throughout Russia, affecting her industries, her railways, her agricultural activities and every other sphere of human enterprise. Canadian readers will find in this dark picture of Soviet Russia a means of appraising for themselves the claims and professions of Bolshevism."

THE LAW OF MORTGAGES OF REAL ESTATE BY JOHN DELATRE FALCONBRIDGE, M.A., L.L.B.

Mr. Falconbridge needs no introduction to the profession as a writer on legal topics, as his work on the Canadian Law of Banks and Banking, published in 1913, has become the recognized Canadian text book on that subject, and on the Law of Bills of Exchange.

The present treatise, however, marks a considerable advance upon his earlier work. Though based on "Bell and Dunn," published in 1899, it has been not only modernized but greatly enlarged, and completely rearranged. Not being in the form of notes upon the statutes, as in his earlier effort, the writer has had greater scope for shewing his mastery of the subject by laying out in advance the plan to be followed throughout the work, and not the least valuable feature of the book is the complete and well arranged "Table of Contents."

The student seeking an analysis of the Law of Mortgages, cannot do better than spend some time on this table; and the practitioner who wants a general account of some point under consideration will turn it up more readily if he will familiarize himself with the logical and careful method first thought out and then invariably adhered to by the writer.

The table of cases is also extensive, and an actual count of a number of pages shews that nearly one-half the decisions referred to are either Canadian or Privy Council judgments in Canadian cases. While Ontario cases are in the majority, there is a sufficiently copious selection from decisions of other Provinces.

Turning to the subject matter, we find that the practical and modern predominate, although there are occasional references to the history of the law and some older forms of mortgage in England, and also an interesting chapter devoted to Law and Equity in Upper Canada, in which that somewhat obscure topic in its relation to the Law of Mortgages is treated. The work is

intended to be, as it is, practical, but one is tempted to regret the absence of a fuller historical treatment of the topic, especially when we recall that Mr. Falconbridge is well equipped for work of that kind. This does not mean, however, that some of the older features of the law are neglected, because where they have a modern bearing they appear to be sufficiently treated. Instances of this are seen in the chapters dealing with the abstruse and now happily rare problems of Consolidation and Tacking, while the principles of the Law of Merger, which involve the consideration of older doctrines, receive a chapter to themselves.

One of the interesting features of the book is Part II., where, under the heading "Priorities," the general principles of equity governing the subject are first taken up, and then priorities created by the Registry Office and Land Titles Act are discussed, and finally the priorities given or formerly given by virtue of the doctrine of Consolidation and Tacking already referred to, are set forth.

Mr. Falconbridge also treats of Subrogation as affecting priorities particularly under the Registry Act, and cites and relies upon the cases of *Brown* v. *McLean*, 18 O.R. 533, and *Abell* v. *Morrison*, 19 O.R. 669. These cases were, at the time they were decided, subjected to a good deal of criticism, and the then Editor of the *Canadian Law Times*, Mr. Edward Douglas Armour, K.C., advanced cogent arguments against their correctness, insofar as they relied upon the doctrine of subrogation. (See 11 C.L.T. 23.)

The other argument mentioned by Mr. Justice Street in *Brown* v. *McLean*, is referred to by Mr. Falconbridge in his foot note on page 129, and the more recent decision of *Noble* v. *Noble*, 25 O.L.R. 329, 27 O.L.R. 342, lends colour to the view that while *Brown* v. *McLean* may be correct in the result, it depends for its validity not upon subrogation but upon the peculiar statutory effect of a discharge of mortgage when registered. Mr. Falconbridge, however, very wisely makes it a rule to cite the cases without too frequently throwing doubt upon their validity.

While the general practitioner will value Mr. Falconbridge's work for its usefulness, one feels that he is entitled to credit in another respect. His book is good literature; and though one does not insist upon excellence of style in a legal work, there is no reason why it should not exist and the standard in our own Province has heretofore been anything but high.

We have not yet developed a Blackstone, Pollock, Anson, Story or Kent, but Mr. Falconbridge, like the late Professor Lefroy, knows and appreciates good English and, like Mr. John S. Ewart, he knows the value of careful study and thought before the actual spade work begins, and the result is that we have in this book a standard set for legal writing, which is all too rare in Canada, but which, let us hope, will become more frequent now that Mr. Falconbridge, like Professor Lefroy and Mr. Ewart, has shewn us that such things can be done here.

SHIRLEY DENISON.

FEES TO WITNESSES AND JURORS.

The increased cost of living touches the administration of justice as it does every other branch of business. At present we refer to two matters which constantly arise in the trial of cases, (1) fees to witnesses, and (2) payment of jurymen. As to the first of these, it was in the good old days considered to be a matter of duty to the public, as well as a matter of friendship for friends or neighbours, for men to give testimony in Court without fee or reward. In the course of time it became the practice to pay a small sum by way of remuneration for their loss of time. The sum is now regulated by a tariff of costs. In Ontario, a witness residing within three miles of the Court House is entitled to one dollar per diem.

As compensation for loss of time this sum is now absurdly inadequate, and if witnesses are to be paid at all, they should be paid something more in accordance with the value of their time. It would not be convenient, or perhaps advisable, to attempt to ascertain what the time of each witness is worth, but

some change in the tariff would seem to be advisable if the practice of paying witnesses at all is to be continued. Cases constantly arise where the present tariff causes trouble.

In a recent case a motorman of a street railway was the only witness, outside the litigants, to an accident as to which a suit arose. He refused to attend Court, although subpoenæd, saying it was a matter in which he had no interest and he would lose a day's pay and only receive one dollar. Cases of a similar character frequently arise.

As to payment to jurymen, history tells us that the jury system began by those who had personal knowledge of the event in question being called together to talk the matter over, and decide the dispute according to their idea of what justice demanded. By degrees outsiders were called in to hear the witnesses and give their opinion, and the present jury system became the law of the land. In those days it was considered an honour to be selected as a juror; time, moreover, was not as valuable as it is now. In these days there is a very practical difficulty confronting some of those who might, under other circumstances, be willing to do patriotic service in a jury room. One difficulty is that, notwithstanding laudable efforts on the part of judges to arrange a convenient time for holding courts, farmers are frequently called away from their farms at seeding time and other times when their presence at home is almost a necessity.

As long as the jury system remains, these and other difficulties arise. It may be that nothing can be done in the way of a remedy, but both these subjects are worthy of consideration.

CONSTITUTIONAL GOVERNMENT.

A writer in *Law Notes* (U.S.A.) refers to a matter which has been a subject of much comment in the United States in connection with the multitude of foreigners who have made that country their home. In the course of his remarks he says: "Our Government was not perfect at its foundation; it has developed

and must continue to develop. But, in its structure and essence it is the best the world has ever seen." We who belong to the British Empire demur to the statement that it is the best constitution the world has ever seen. That, however, should not be laid to the charge of those who formulated it; they did the best they could at the time. The British constitution is the result of development for a period of a thousand years or so, and ought to be, as it is, the best. One difficulty our neighbours to the South of us had to contend with was the tremendous importation of foreigners, owing to their desire to increase the population. It is an evil which we have copied in this country of later years, as we know now to our sorrow. The writer adds these words: "Many methods have been suggested by which we may proceed to make this more of a nation and less of a polyglot boarding house."

The "Americanization" of these too numerous foreigners is the remedy suggested. The description above given of a nation's difficulty shews that the writer is fully alive to the situation, and the desirability of Americanizing, or preferably Anglo-Saxonizing, these polyglot boarders.

WAR CRIMINALS.

The draft Treaty of Peace had a section stating the terms agreed upon by the Allies as to the trial and punishment of war criminals. These terms as then set forth were as follows:—

"The Allies publicly arraign the ex-Emperor William II. for a supreme offence against international morality and the sanctity of treaties.

"The ex-Emperor's surrender is to be asked for from the Dutch Government, and a special tribunal is to be set up, consisting of one judge from each of the five Great Powers. The tribunal is to be guided by the highest principles of international policy, and is to have the duty of fixing whatever punishment it thinks should be imposed.

"Military tribunals are to be set up by the Allies to try persons accused of acts of violation of the laws and customs of war, and the German Government is to hand over all persons so accused.

"Similar tribunals are to be set up by any particular Allied Power against whose nationals criminal acts have been committed.

"The accused are to be entitled to name their own counsel, and the German Government is to undertake to furnish all documents and information the production of which may be necessary."

We trust that in the many changes that have since been made nothing has been arranged to lessen the force of these conditions. Brutal murder should not go unpunished whether committed in war time or when peace reigns. We may here quote from *Law Notes* (U. S.) some satirical observations which are appropriate in this connection:—

"Prisoner at the bar," said the judge, "you are by your own admission guilty of unnumbered crimes. You have murdered, ravished and burned. You have spared neither age nor childhood. Before this court women have sobbed out the tale of the dishonour they have endured at your hands; little children have exhibited the mutilations you have inflicted on them. This once fair countryside has been made desolate by you. But I understand you are now going to lead a better life." The prisoner looked down at his manacled hands and sidewise at the burly guards around him and forced his evil face into the semblance of a smile. "Yes, your honour," he responded. "In that case," said the judge, "you are discharged. We have formed in this country a law and order league, to membership in which you have been admitted, and some of our best citizens will be glad to let you rest in their homes until you recover from the fatigue caused by your resisting arrest."

UNBORN PERSONS AS LITIGANTS.

Cases sometimes arise where persons who may hereafter come into existence would be interested in questions brought before the Court for decision, and it is desirable that they should be bound by the result of the litigation, and as they are not in existence it is obvious they cannot be made parties, so the *Rules* provide for the appointment of some person to represent them: see *Rules* 76, 77. An application was recently made for the appointment of such a representative to be added as a defendant: see *Lang* v. *Toronto General Trusts Cor.*, 16 O.W.N. 193, but according to the reporter the Judge ordered the unborn persons to be made parties; we are afraid the reporter must have misrepresented the learned Judge, and probably the order actually made was as asked, viz., for the addition of the Official Guardian as a defendant appointed to represent the unborn issue; for, although Parliament is said to be able to do anything except turn a man into a woman, we doubt very much if it could empower the Court to make a nonentity a defendant; at all events the *Rules*, which have the force of a statute, do not at present appear to authorize that proceeding.

THE PRESUMPTION OF PATERNITY.

The maxim of the common law is that marriage is the proof of paternity, and this is really only a translation of the passage in the Digest (24.5), *Pater vero is est quem nuptiae demonstrant.* The civil law, however, differed from the common law in permitting the presumption of paternity which was afforded by the existence of the marriage to be more easily rebutted. When the question of legitimacy comes up for decision at the present day in jurisdictions where English law is administered—as in peerage cases, affiliation cases, etc.—the most difficult points to determine are usually the limits within which the presumption of paternity afforded by marriage is allowed to be rebutted, and the strength of the evidence necessary to successfully rebut the presumption.

The two cases in the English courts in which the subject has been most recently under discussion seem to be *Gordon v. Gordon* (90 L.T. Rep. 597; (1903) P. 141) and the *Poulett Peerage* (1903) A.C. 395), the former having been decided on the 12th March, the latter on the 24th July, of the year 1903. In each case the legitimacy of a child born in wedlock was disputed, and, although the two cases were entirely dissimilar in their circumstances, it is worth noting that the judicial enunciation of the principles on which the legitimacy of a child born in wedlock may be controverted was not uniform, though practically contemporaneous.

In the *Poulett Peerage* the statement by a husband that he had not had connection with his wife before marriage was held admissible to shew that a full-grown child born six months after marriage was not his child. Lord Halsbury on that occasion said: "There was at one time authority for saying that if the husband and wife were within the four seas you must presume that there was intercourse, and that you could not possibly contradict it. I think that idea is completely exploded. The question is to be treated as a question of fact, and, like every other question of fact when you are answering a presumption, it may be answered by any evidence that is appropriate to the issue." In *Gordon* v. *Gordon* Sir Francis Jeune, in giving the custody of a child to the father, respondent in the suit, declined to act on or pay any attention to the statement of the mother that the child's father was the co-respondent in the suit. The President quoted from Nicolas on Adulterine Bastardy, as representing "accurately the law on the subject," a passage of which part runs as follows (the italics being in the original): "Sexual intercourse between man and wife must be presumed, and *nothing, except evidence* that the husband *did not have such intercourse* at the period of conception, can illegitimise a child born in wedlock." Nicolas says further on (though not quoted in *Gordon* v. *Gordon*): Unless it was *impossible* for the husband to be the father of the infant . . . the law protects the interest of the child by securing to it the right of legitimacy." In

view of Sir Francis Jeune's observation that Nicolas represents "accurately the law on the subject," it is important to point out that this observation and Nicolas' statements are opposed to the current of authority and considerably exaggerate the difficulty of rebutting the presumption of the paternity of a child that arises from the fact of the marriage of its mother.

The quotation from the *Poulett Peerage* made above, though not under the circumstances a binding pronouncement or decision, does in fact represent broadly the result of cases in the House of Lords such as the *Banbury Peerage* case (1811, 1 Sim. & St. 153) and *Morris* v. *Davies* (1837, 5 Cl. & F. 163), though the law as to admissibility of evidence in legitimacy cases is in some respects on a footing of its own. The *Banbury Peerage* case is fully reported in Sir H. Nicolas' book, pp. 291-551, the report above cited giving only the opinion of the Judges in answer to questions put to them in the House of Lords. These opinions were, however, the basis of the House of Lords' decision in the case and were subsequently examined and approved in *Morris* v. *Davies* (*sup.*). The result of these two cases is that the presumption of legitimacy arising from the birth of a child during wedlock may be rebutted by circumstances which, to the satisfaction of the judicial tribunal, lead to a contrary presumption. That is, it need not be shewn that it was "impossible for the husband to be the father" as laid down by Nicolas. The rule as laid down in *Morris* v. *Davies* was again approved of in the *Aylesford Peerage* (1885, 11 A.C. 1).

The reliance placed by Sir Francis Jeune in *Gordon* v. *Gordon* upon Nicolas on Adulterine Bastardy was probably due to its being overlooked that Sir Harris Nicolas wrote his book in a measure to demonstrate that the *Banbury Peerage* case was wrongly decided, and before the case of *Morris* v. *Davies* had gone to the House of Lords, where the decision of Lord Lyndhurst in Chancery was affirmed.

The whole subject of the strength and admissibility of evidence to rebut the presumption of the legitimacy of a child born in wedlock has recently been discussed in an Australian

case: (*In the Estate of L.*, 1919, V. L. R. 17). The judgment delivered by Mr. Justice Cussen in the Supreme Court of Victoria is a valuable contribution to the literature of the subject. All the relevant English cases and authorities seem to have been cited. The applicant in *In the Estate of L.* claimed to be entitled to a share in certain funds as the child of a lady who was admitted to be her mother. The applicant was born in wedlock, but during a period of complete separation between her mother and the latter's husband. The legitimacy of the applicant was disputed, and it was necessary for her, in order to establish her claim to the share in the funds in question, to shew that her father was the husband of her mother. This the applicant failed to do, and it was eventually decided that she was not legitimate, and had not established her claim to the share in the funds. The evidence on which it was held that the initial presumption of the applicant's legitimacy had been effectually rebutted consisted largely of circumstances connected with the mother's life and the conduct and statements of the husband and the wife and her paramour. The husband was never, apparently, away from Victoria, so that there was no actual impossibility of his having had access to his wife at the time of the applicant's conception. The point of view taken by the court is shown by two extracts from the judgment: "The admission of evidence relating to the conduct of husband or wife or alleged adulterer is a special exception to the ordinary rules of evidence. . . . It is a case in which legal relevancy is made to conform to logical relevancy by reference to almost universal experience based upon the affection of a parent for his or her offspring, and the contrary feeling induced in a husband in the case of spurious issue of a wife." "Now, in this case I am satisfied that the general presumption of legitimacy and sexual intercourse at the critical time between husband and wife has been repelled."

In the *Poulett Peerage* (*sup.*) the husband refused to recognize as his a child born after marriage which must have been begotten before marriage. The evidence was sufficient to rebut

the presumption of legitimacy. In general, however, the case of antenuptial conception stands upon a ground of its own. In *Rex* v. *Luffe* (1807, 8 East, 193) Lord Ellenborough said: "The marriage of the parties is the criterion adopted by the law, in cases of antenuptial generation, for ascertaining the actual parentage of the child. For this purpose it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage." This quotation has been taken as part of the headnote to the report of *Turnock* v. *Turnock* (1867, 16 L. T. Rep. 611). In that case it was held by Sir J. P. Wilde that a child born within six months of the marriage was the legitimate daughter of her parents, and administration of the goods of her deceased father was granted to her.

This general rule as to ante-nuptial generation was at one time thought to have been broken in *Foxcroft's* (*Foxcote's*) case, an old case of 10 Edw. 1 (1 Rolle Abr. 359), which, according to Sir Harris Nicolas, is "the earliest case of legitimacy which is reported." According to this case (as usually translated from the Norman-French) a woman was married to the man by whom she was pregnant twelve weeks before the birth of her child; the child was declared a bastard and incapable of inheriting the land of his deceased father. This case is the subject of a reporter's note in *Rex* v. *Luffe* (*sup*), and in Nicolas' Adulterine Bastardy it was pointed out that the case had been "*entirely misunderstood*, and that the question which arose . . . depended solely upon the validity of the marriage itself": (p. 562; italics in the original). The difficulty was cleared up, as far as it can be cleared up, in 1893 by an account of the original roll given in the preface to vol. 9 of the Revised Reports.

All the cases above referred to have been cases where the presumption of legitimacy was rebutted by evidence that the husband did not have access to the wife at such a time as to make it possible for him to have been the father of the person whose legitimacy was in question. Where there are other reasons for doubting the fact of paternity—as impotence, etc.—than

mere want of access, different considerations come into play. But, as regards the mere question of access or no access, the broad rule is that the presumption of paternity may be rebutted by any evidence that is satisfactory to the tribunal deciding the case, and it is not necessary that the impossibility of access should be absolutely demonstrated.—*Law Times.*

PREFERENCE SHARES AND SURPLUS ASSETS.

It has sometimes been argued that a preference share has affinities to a debenture—that it is, in fact, a thing halfway between an ordinary share and a debenture. At any rate, the exact nature of preference shares and the rights they confer on their holders are by no means yet finally fixed. In particular, judicial authority as to the right of preference shareholders to participate in the distribution of surplus assets on the winding-up of the company may be said to be still fluid. It is, of course, always a question of construing the contract between the company and the preference shareholders, and the contract includes as part of its terms the memorandum and articles of association in addition to any resolutions under the authority of which preference shares may have been issued. Occasionally the contract is precise, as in *Re South African Supply and Cold Storage Company* (91 L.T. Rep. 447; (1904) 2 Ch. 268), where the memorandum expressly provided that preference shares should have certain rights and priorities, but were not to "confer any further right to participate in profits or surplus assets." More often nothing precise is said about the right of a preference shareholder to any part of the surplus assets, and it appears to be a matter of mere accident that this question has not arisen more frequently.

At one time the same doubt existed on the subject of the rights of preference shareholders to any share in the profits or dividends beyond the actual preferential rights accorded to them in so many words. But it seems now to be settled that the right of preference given once and for all to the shareholder is all he is entitled to in respect of his preference shares. In *Will* v.

United Lankat Plantations Company (107 L.T. Rep. 360; (1912) 2 Ch. 571) Lord Justice Farwell said: "The whole of the attributes of a preference share are limited and defined on its birth. It has a preference, and such a preference as is given to it by the resolution." This observation was approved of when the case went on appeal to the House of Lords, where it was affirmed (109 L.T. Rep. 754; (1914) A.C. 11). Lord Atkinson said: "If one had to construe the second of these resolutions, one would naturally come to the conclusion that the dividend prescribed was the only dividend the shareholder was to receive. It is said that the earlier part of the resolution by making him a shareholder gives him a right to some additional dividend on distribution. It does not appear to me to be at all capable of that construction." It might perhaps have been thought that this principle of restricting the rights of preference shares with respect to dividends would apply to the case of surplus assets; however, Lord Justice Farwell in the case quoted declined to admit this, and observed that "the considerations affecting capital and dividend are entirely different." The question of dividends related to the concerns of a company as a going concern, whilst any question of surplus assets only arises on a winding-up.

The difficulty in determining whether, apart from positive provisions of the whole contract between the company and the shareholder, a preference share does carry with it the right to a share of surplus assets on a winding-up has been brought once more into prominence by a decision of Mr. Justice Astbury—*Re Fraser and Chalmers Limited*—(see *post*, p. 45). The assets were those remaining after payment of the liabilities of the company, the capital paid up on the preference and ordinary shares, and arrears of dividends on the preference shares. Under the resolutions creating the preference shares nothing was said directly affecting the right of preference shareholders to these assets, the only right given being one "to have the surplus assets applied, first, in paying off the capital paid up on the preference shares held by them respectively; and, secondly, in paying off

the arrears (if any) of the preferential dividend aforesaid to the commencement of the winding-up before any return or payment of capital is made to the holders of the other shares." Sec. 186 (1) of the Companies (Consolidation) Act 1908 is: "The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and subject thereto shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company." But this affords no light on the question under consideration. Mr. Justice Astbury did not agree with the contention that the express rights given to the preference shareholders were the whole of their rights as such, since they had voting and other rights as members of the company; they should not therefore be deprived of a right to share in an ultimate surplus. The result was that the surplus assets were ordered to be distributed rateably between the ordinary and the preference shareholders. The case of *Re Espuela Land and Cattle Company* (101 L.T. Rep. 13; (1909) 2 Ch. 187) was held to be a direct authority for this decision and was followed accordingly.

Re Espuela Land and Cattle Company was decided by the present Master of the Rolls (then Mr. Justice Swinfen Eady), and is notable for containing a definite statement of the broad principle that: "There is not any rule of law that shareholders having a fixed preferential dividend take that only," or are debarred from sharing in a distribution of surplus assets on a winding-up. One of the questions in this case was how the assets remaining after paying preference capital, interest thereon, and ordinary capital were to be distributed. The articles gave the preferential shareholders a right to a cumulative preferential dividend of 10 per cent., and a preferential right on winding-up "to be paid out of the property and assets of the company the full amount of capital paid up" on the shares. Nothing was said about surplus assets. Mr. Justice Swinfen Eady held, after enunciating the general principle above referred to, that as a matter of construction there was nothing in the memorandum or articles taking away the *primâ facie* right of

the preference shareholders to participate with the ordinary shareholders in the surplus assets. These surplus assets were therefore distributed rateably between the preferred and the ordinary shareholders according to the nominal amount of the shares. In this particular instance each preference share was one hundred times the nominal amount of each ordinary share, and received a proportion of the distributed assets accordingly. It is to be noticed that the argument on behalf of the ordinary shareholders that the preference shareholders had no rights in the company's assets beyond repayment of their capital with interest—which would place a preference share rather on the footing of a debenture—was expressly rejected.

This question, however, was only one of several that arose for decision in *Re Espuela Land and Cattle Company*, and possibly might have been considered more fully. At any rate, it was considered much more fully in a subsequent case before Mr. Justice Sargant—*Re National Telephone Company* (109 L. T. Rep. 389; (1914) 1 Ch. 755)—with the result that an opposite conclusion was arrived at, and the principle laid down by Mr. Justice Swinfen Eady and referred to above was not acted on. In *Re National Telephone Company* there were several classes of preferred shareholders, and the rights conferred on some of the preference shares were not restricted to the payment of a fixed dividend. In no case, however, was any right to a share in the surplus assets on a winding-up expressly given to any preference shareholder. Mr. Justice Sargant referred to the observations of Lord Justice Farwell in *Will* v. *United Lankat Plantations Company* (quoted above), and thought that the Lord Justice had "applied to the rights of preference shares with regard to dividend a canon of construction which is necessarily applicable in the same way to the rights of preference shares in the winding up, if those rights are expressly provided for." The learned Judge went on to say that, seeing that Mr. Justice Swinfen Eady had treated rights in winding-up and rights to dividend as analogous, and that the Court of Appeal had made use of the canon of construction referred to, authority was in

favour of the view that the express attachment of rights to preferential shares on their creation "is *primâ facie* a definition of the whole of their rights in that respect, and negatives any further or other right to which, but for the specified right, they would have been entitled." Apart from this authority, Mr. Justice Sargant also thought that "as a matter of ordinary construction, not only from the business point of view, but from the legal point of view, the express mention of the rights which the preference shareholders were to be entitled to in a winding-up would have operated as an exclusion of any further or other rights." Thus the decision in *Re National Telephone Company* was that the whole of the surplus assets were divisible among the ordinary shareholders (or deferred stockholders).

In both *Re Espuela Land and Cattle Company* and *Re National Telephone Company* the question whether preference shares are entitled to any of the surplus assets is treated as a matter of construction. This, of course, is so in a general way. But the divergence in result between the two cases is brought about by different canons of construction being applied. It remains to be seen which is the canon that will be finally held to be the right one. The most recent case—*Re Fraser and Chalmers Limited*—follows *Re Espuela Land and Cattle Company* in construing the rights expressly given to preference shares as part only of their rights. It may ultimately turn out that the other canon—by which "the whole of the attributes of a preference share are limited and defined on its birth"—is the proper canon of construction to be adopted. Until this conflict of authority is settled, it will be difficult for preference shareholders to get satisfactory legal advice as to their position.

When the decision in *Re National Telephone Company* was given by Mr. Justice Sargant, the case of *Will* v. *United Lankat Plantations* had not reached the House of Lords. That the Court of Appeal's decision in that case was affirmed (though, of course, only on the question of dividends payable when the company was a going concern) is all in favour of the canon of construction adopted and the view taken in *Re National Telephone Company.—Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

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BANKRUPTCY—SECURED CREDITOR—JUDGMENT CREDITOR—EQUITABLE EXECUTION—RECEIVER.

Re Pearce (1919) 1 K.B. 354. Although this is a bankruptcy case it is deserving of attention inasmuch as Horridge, J., has therein decided that a judgment creditor who by way of equitable execution has obtained the appointment of a receiver, does not thereby become "a secured creditor," where the application of the moneys to be received depends on a further order to be obtained, and which is not in fact obtained, before an act of bankruptcy supervenes. In this case the order appointing the receiver provided that the moneys to be received should be applied in carrying on the business of the debtor and to "retain the balance of said profits to be applied in discharge of the debts and costs due to the plaintiffs as and when may be hereafter ordered," and by a subsequent order it was directed "that the receiver be at liberty to accumulate the balance of the said profits to form a fund out of which the judgment creditors may be paid their debts and costs." Some of the moneys received had been paid into Court. It was held that as neither of these orders actually ordered the payment or application of the moneys to the plaintiffs they had no lien or charge on them, and were, therefore, not "secured creditors" as against the trustee in bankruptcy who became, on his appointment, entitled to the surplus in Court and in the hands of the receiver.

TORT—ANIMALS FERÆ NATURÆ—RATS—BUSINESS ATTRACTING RATS TO PREMISES—INJURY DONE BY RATS ON ADJOINING PREMISES—CAUSE OF ACTION.

Stearn v. *Prentice* (1919) 1 K.B. 394, was an action of a novel kind. The plaintiff alleged that the defendants carried on a bone manure factory which had the effect of attracting a large quantity of rats, and that the rats from there invaded the plaintiff's premises and ate his corn causing substantial loss to the plaintiff; *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, and kindred cases were relied on in support of the plaintiff's case but on appeal from a County Court a Divisional Court (Bray and Avory, JJ.) held that they did not apply, and there being no evidence that the bones kept by the defendants were excessive or unusual in quantity, they could not be held responsible for the rat nuisance. The fact that the plaintiffs were at liberty to destroy any rats on their premises was held to differentiate the case from cases where the collection of a crowd of people to the annoyance of one's neighbours was held to be an actionable nuisance.

PRACTICE—SURPRISE—ACTION TRIED BY JURY—NEW ISSUE RAISED BY DEFENDANT AT TRIAL—NO APPLICATION FOR ADJOURNMENT —TRIAL LASTING SOME DAYS AFTER NEW ISSUE KNOWN—NEW TRIAL.

Isaacs v. *Hobhouse* (1919) 1 K.B. 398. This was an application by the plaintiff for a new trial on the ground of surprise. The action was for libel and was tried with a jury. On the second day of the trial or beginning of the third day, the plaintiff hearing that the defendant was going to state that the first of the two interviews at which facts material to some of the questions in issue arose, was some months earlier than the plaintiff thought was admitted to be the date, and on this new issue the plaintiff was not prepared with evidence to corroborate his evidence as to the date. No adjournment, however, was asked and the trial proceeded some days longer and resulted in a verdict for the defendant. The plaintiff rested his claim to a new trial on the ground that he was surprised by the new issue, and that it would have been useless to have asked for an adjournment as his principal witness on the point was absent in America and he did not then know what evidence he would be able to give. The Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.) refused the motion, holding that as the plaintiff did not apply for an adjournment, he must be taken to have taken his chance of obtaining a verdict on the evidence then at his disposal.

PRACTICE—INJUNCTION TO RESTRAIN PROCEEDINGS—CONCURRENT ACTION AS TO SAME MATTER—PROCEEDINGS BY PLAINTIFF IN ENGLAND AND BY DEFENDANT IN SCOTLAND—OPPRESSIVE OR VEXATIOUS PROCEEDINGS—BURDEN OF PROOF.

Cohen v. *Rothfield* (1919) 1 K.B. 410. On September 9, 1918, this action was commenced by the plaintiff against the defendant as his agent claiming an account and for damages for breach of duty in wrongly inducing the plaintiff's customers to become the defendant's customers. On September 14, the defendant commenced an action in Scotland against the plaintiff claiming an account of the transactions between himself and the plaintiff. The plaintiff applied to restrain the defendant from prosecuting the Scotch action as being in the circumstances vexatious and oppressive. Shearman, J., granted the application, but the Court of Appeal (Scrutton, L.J. and Eve, J.) held that as it appeared that the defendant had announced his intention of bringing the Scotch action before the plaintiff commenced the present action, and had more diligently prosecuted his action than the plaintiff

had prosecuted the present action; and it had not been shewn that the defendant would not gain some advantage by his action in Scotland which he could not get in the present action, the plaintiff had not discharged the burden which was on him of shewing that the Scotch action was vexatious and oppressive. The order of Shearman, J., was thereupon reversed.

CRIMINAL LAW—EVIDENCE OF ACCOMPLICE—CORROBORATION—SILENCE OF ACCUSED WHEN CHARGED.

The King v. *Feigenbaum* (1919) 1 K.B. 431. This was an appeal from a conviction and the question for the Court was whether or not the evidence of an accomplice had been sufficiently corroborated. The appellant was charged with having incited certain boys to steal fodder. Evidence was given for the prosecution by the boys and also by a police officer, who stated that he called at the appellant's house after the boys had been arrested and had told him that the boys, giving their names, had informed the police that the appellant had sent them to steal the fodder, and that they had stolen fodder for the appellant on other occasions, giving the dates, and that the appellant had paid them specified sums for the stolen fodder and that to this statement the appellant had made no reply. A Divisional Court (Darling, Avory, and Shearman, JJ.) came to the conclusion that the jury had been rightly directed that they were entitled to consider whether the appellant's failure to reply to the officer was not in the circumstances some corroboration of the boys' evidence, and, therefore, the conviction could not be disturbed, but the Court reduced the sentence from four to three years penal servitude.

VENDOR AND PURCHASER—SALE BY MORTGAGEE UNDER POWER—"REALISE ANY SECURITY"—OMISSION BY MORTGAGEE TO OBTAIN LEAVE OF COURT—DAMAGES PAYABLE BY VENDOR—COURTS (EMERGENCY POWERS) ACT, 1914 (4-5 GEO. V. c. 78), s. 1—(5 GEO. V. c. 22, Ont.).

Braybrooks v. *Whaley* (1919) 1 K.B. 435. This was an action by a purchaser for specific performance of a contract for the sale of land. The sale had been made by the defendant as mortgagee under a power of sale. He had omitted to obtain the authority of the Court to realise his security as required by the Courts (Emergency Powers) Act (4-5 Geo. V. c. 78), (see 5 Geo. V. c. 22, Ont.) and in consequence the sale could not be carried out, the plaintiff claimed a return of his deposit and £50 damages for breach of the contract, and judgment was given therefor in

the County Court. On appeal to a Divisional Court (Horridge and Salter, JJ.), the defendant contended that the rule laid down in *Bain* v. *Fothergill*, L.R. 7 H.L. 158 to the effect that a purchaser is not entitled to damages for loss of bargain, but only for expenses he has been put to in investigating the title—applied; but the Court held that the defendant's omission to get the necessary authority to realise his security was due to his own default, and not to any defect in title and therefore he was liable to pay to the plaintiff damages for loss of his bargain over and above the costs he had been put to. The appeal therefore failed.

BAILOR AND BAILEE—AGISTMENT—THEFT FROM BAILEE—DUTY OF BAILEE—DUTY OF BAILEE ON THEFT OF BAILMENT—NEGLIGENCE OF BAILEE—ONUS OF PROOF.

Coldman v. *Hill* (1919) 1 K.B. 443. This was an action by a bailor against his bailee for loss of the subject of the bailment. The defendant was a farmer and took in cattle for agistment, and the plaintiff sent him seven cows to be agisted. On June 5 two of plaintiff's cows were stolen and were never afterwards recovered or heard of. They were stolen without any default of defendant. On June 6 some fifteen or sixteen hours after the theft the defendant's stockman reported the theft to the defendant, who, in mistaken and unwarranted belief that the plaintiff himself had taken the cows away, did nothing. On June 7, the stockman also reported to the defendant that two men had been seen driving the cows away at midday on June 5, but the defendant took no step to inform the plaintiff or the police and made no effort to trace the cows himself. Three weeks afterwards, on coming to take away the cows, the plaintiff first learnt of the theft of the cows. The County Court Judge, who tried the action, gave judgment for the plaintiff, but on appeal to a Divisional Court it was held that there was no evidence that the defendant's neglect to inform the plaintiff or the police had caused the loss, and the Court therefore directed judgment to be entered for the defendant. The plaintiff then appealed to the Court of Appeal (Bankes, Warrington, and Scrutton, L.JJ.), and that Court held that, although a bailee is not liable for theft of the thing bailed, if the theft take place without his default, it is nevertheless his duty where a theft takes place to promptly give the bailor and police notice, and if he does not, the onus is then on him to shew that such neglect has not contributed to the loss; and, as in this case, the bailee had not discharged that onus, he was liable for the loss.

SALE OF GOODS—UNASCERTAINED GOODS—APPROPRIATION BY SELLER—IMPLIED ASSENT OF BUYER—PASSING OF PROPERTY IN GOODS—THEFT OF GOODS AFTER APPROPRIATION TO CONTRACT.

Pignataro v. *Gilroy* (1919) 1 K.B. 459. In this case certain goods, the subject of a contract of sale, were stolen after they had been appropriated to the contract, and the question was whether the appropriation had been assented to by the buyer. The contract was made on February 12 for the sale of 140 bags of rice delivery to be taken in 14 days. The sale was by sample and the particular bags that were to satisfy the contract were not then ascertained; but the buyer was told that 15 bags would be delivered at the seller's place of business, 50 Long Acre, and 125 bags at Chambers' Wharf. On February 27 the buyer sent a cheque for the price and the next day the seller sent a delivery order for the bags at Chambers' Wharf, and stated that the 15 bags were ready at 50 Long Acre. The plaintiff neglected to send for the 15 bags until March 25, when it was discovered that the bags had been stolen without any negligence of the defendants, the sellers. The buyers brought the present action to recover the price paid for the 15 bags. The Judge of the County Court who tried the action gave judgment in favour of the plaintiffs because he was of the opinion that there was no evidence of appropriation by either party with the assent of the other and consequently that the property in the goods had not passed; but a Divisional Court (Lawrence and Rowlatt, JJ.) reversed this decision holding that in the absence of any dissent on the part of the buyers when notified of the appropriation by the sellers of the 15 bags they must be presumed to have assented thereto. The action was therefore dismissed.

CONTRACT — ILLEGALITY — EMERGENCY LEGISLATION — REGULATION RESTRICTING BUILDING—DEFENCE OF THE REALM (CONSOLIDATION) REGULATIONS, 1914—REGULATION 8E—BREACH OF REGULATION.

Brightman v. *Tate* (1919) 1 K.B. 463. This was an action to recover the balance due under a building contract. The defence was that the work had been done in breach of Regulation 8E made by the Minister of Munitions which forbade the carrying on of any building operations without a licence except where the total cost of the completed work in contemplation did not exceed £500. On June 29, 1916, the plaintiff contracted to do the work in question for a sum equal to the prime cost and ten per cent.

profit, the contemplated total cost being £1,500. On September 29, 1916, a licence for the work was granted subject to the condition that the total cost should not exceed £1,350. By December, 1916, work of that value had been done, but the contract was not completed. No further licence was applied for, but the work was carried on to completion in April, 1917. The total cost amounted to £2,671. The action was brought to recover the balance, £1,171. McCardie, J., held that the plaintiffs could not recover, as the order of the Minister of Munitions was tantamount to a statutory prohibition to do the work in question. He also held that the fact that it was the defendants' duty to get the required licence, and that they were relying on their own omission to obtain it, as a ground of defence, was no answer to the defence of illegality, but he intimates that if the plaintiffs had carried on the work in the *bonâ fide* belief that the licence which had in fact been obtained covered the work in question, it might have made a difference; but he found as a fact that the plaintiff well knew the limited nature of the licence, and they nevertheless carried on the work in the hope that no question would be raised. The action was therefore dismissed.

PRACTICE—COUNSEL'S AUTHORITY TO COMPROMISE—LIMITATION OF AUTHORITY UNKNOWN TO THE OTHER SIDE—MISTAKE—CONSENT ORDER—RESCINDING CONSENT JUDGMENT BEFORE DRAWN UP.

Shepherd v. *Robinson* (1919) 1 K.B. 474. This was an appeal from an order of Darling, J., restoring the action to the list for trial notwithstanding a consent to judgment by the defendants' counsel. Before the judgment had been drawn up the defendant had applied to Darling, J., to restore the action to the trial list, it being shewn that after the case was on the list for trial, the defendant had expressly instructed her solicitor not to consent to any compromise of the action: this was unknown to her counsel, or the counsel or solicitor for the plaintiff at the time the consent was given. In these circumstances the Court of Appeal (Bankes, Warrington and Duke, L.JJ.) held that the order of Darling, J., was correct, following *Holt* v. *Jesse*, 3 Ch.D. 177.

SALE OF GOODS—ORAL CONTRACT—PART PAYMENT—SALE OF GOODS ACT, 1893 (56-57 VICT. c. 71), s. 4 (1)—(R.S.O. c. 102, s. 12).

Parker v. *Crisp* (1919) 1 K.B. 481. In this case the question was whether or not there had been a sufficient part payment on

an oral contract for sale of goods to satisfy the Sale of Goods Act (56-57 Vict. c. 71), s. 4 (1), (see R.S.O. c. 102, s. 12). The facts were that the plaintiff verbally agreed to buy from the defendant for £387 10s. a quantity of saccharine, and on the same day sent the defendant a cheque in accordance with the agreed mode of payment. On the following day—the duty on saccharine having been in the meantime increased—the defendants wrote to the plaintiffs: "As you are aware the duty on saccharine since yesterday has been increased practically double, and unless you are able to pay the excess duty we regret we shall be unable to send you the goods. We will return your cheque with pleasure on hearing that you will not require the goods." The plaintiffs refused to pay the increased duty, there being no stipulation in the contract to that effect, and after some correspondence the plaintiffs returned the cheque a few days later. A Divisional Court (Coleridge and Avory, JJ.) held on appeal from a County Court that there had been a valid part payment within the statute; although a payment immediately returned would not have been sufficient. In this case the Court held that on the facts there had been an acceptance of the cheque as part payment coupled with a threat to return it, if the defendant's further demand in regard to the increased duty was not acceded to, and so read, it was consistent only with a recognition on the part of the defendants of the contract that had been made.

SALE OF GOODS—IMPLIED CONDITION—"MERCHANTABLE QUALITY" —"IF BUYER HAS EXAMINED THE GOODS"—SALE OF GOODS ACT, 1893 (56-57 VICT. c. 71), s. 14.

Thornett v. *Beers* (1919) 1 K.B. 486. Although this case turns on the construction of the Sale of Goods Act, 1893 (56-57 Vict. c. 71), s. 14, it is nevertheless deserving of attention as that Act is generally understood to be a codification of the common law on the subject. The Act provides that "where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed." The defendants, who were desirous of purchasing from the plaintiffs a quantity of vegetable glue, who dealt in that article, and before doing so went by arrangement with the plaintiffs to the warehouse where the glue, which was in barrels, was stored for the purpose of inspecting. Every facility was

offered to the defendants for inspection, but being pressed for time they did not have any of the barrels opened and merely looked at the outside thereof. They purchased the glue, and after it was delivered they alleged it was not merchantable. Bray, J., who tried the action, held that there had been an examination of the goods within the meaning of the Act, and therefore the defence that the goods were not of merchantable quality was not open to the defendants.

WILL—VESTING—GIFT TO CLASS ATTAINING TWENTY-ONE—PERIOD OF VESTING—ADVANCEMENT OUT OF "VESTED OR PRESUMPTIVE SHARES"—CLASS WHEN CLOSED ON ELDEST ATTAINING TWENTY-ONE.

Re Deloitte, Griffiths v. *Allbeury* (1919) 1 Ch. 209. By a rule of construction laid down in the case of *Andrews* v. *Partington* (1791) 3 Bro. C.C. 401, in the case of a bequest to a class the members of which would be entitled to payment on attaining wenty-one; on the first member attaining twenty-one, the class is closed, unless there be something in the will to indicate a contrary intention on the part of the testator. The rule is confined to wills and does not extend to settlements. The question in this case was whether or not the rule was applicable, which depended on whether or not a contrary intention was manifested in the will. By the will in question £4,000 was bequeathed to trustees in trust to pay the incom e to Eliza Allbeury during her life, and after her decease in trust to hold the same for all the children equally, or any child, if only one, of the present or future marriage of Edward Allbeury, who should attain twenty-one. A further sum of £3,000 was bequeathed, without any intervening life estate, to all the children of Edward Allbeury whether living at the testatrix's death or born afterwards who should attain twenty-one. The testatrix empowered the trustees to raise any part not exceeding the whole one-third of "the presumptive or vested share" of any such child of the said Edward Allbeury and apply the same for his or her maintenance or advancement. Both Eliza and Edward were living. Edward was married and had only one child and he had attained twenty-one in April, 1918. It was contended by counsel representing unborn issue of Edward, that the rule in *Andrews* v. *Partington* was not applicable because of the direction for maintenance out of the "vested or presumptive" shares—but the Court of Appeal (Eady, M.R., Duke, L.J., and Eve, J.), overruling Sargent, J., held that the words "vested or presumptive" applied only to the £4,000 fund, and the word "presumptive" to the £3,000 fund and therefore the rule applied and on Edward's son attaining twenty-one the class was closed, and he became entitled to the immediate payment of the £3,000.

WILL—CONSTRUCTION—LEGACY ON CONDITION OF THE LEGATEE REMAINING IN A CERTAIN "EMPLOYMENT" FOR A SPECIFIED PERIOD—SERVICE IN H.M. FORCES WHETHER BREACH OF CONDITION.

In re Cole, Cole v. *Cole* (1919) 1 Chy. 218. This also was a case of construction of a will whereby a testator had bequeathed a legacy to his three sons who should, prior to attaining the age of twenty, enter the employ of a named company and remain in such employ until the age of thirty-three. One of the sons born in 1895 in 1913 entered the employ of the named company, but in September, 1914, he voluntarily enlisted in H.M. Forces, with the consent of the directors of the company, from which he had not obtained his discharge. The trustees applied to the Court to determine whether the legatee had remained in the employment of the company within the meaning of the will while serving in the army. Sargant, J., decided that he had, and that the fact that his actual services and pay had been suspended during his absence was not material.

COMPANY-SHARES—JOINT HOLDING—RIGHT OF JOINT HOLDERS TO SPLIT THEIR HOLDINGS—ALTERATION OF REGISTER.

Burns v. *Siemens* (1919) 1 Chy. 225. This was an action to compel a joint-stock company to rectify its register in respect of certain shares jointly held by the plaintiffs in the company. These shares were at present registered in the joint names of the plaintiffs Burns and Hamboro and under the articles of the company Burns, whose name appeared first on the register, was alone entitled to vote on and represent the shares at meetings of the company, and consequently in the case of Burns' illness, the shares could not be represented. The plaintiffs desired to have the register altered, and have one-half the shares registered in the names of Hamboro and Burns. The company, for some reason not very apparent, resisted the action, but Astbury, J., who tried it, held that the plaintiffs were entitled to have the rectification of the register which they desired.

LIBEL—EXCESSIVE DAMAGES—MISDIRECTION—NEW TRIAL—ORD. XXXIX. R. 6—(ONT. JUD. ACT, S. 28).

Barber v. *Deutsche Bank* (1919) A.C. 304. This was an action for libel in respect of eight bills of exchange accepted by the plaintiffs. The libel was proved as to one bill, but not as to the other seven. Special damage as to the seven was shewn by reason of the statement complained of to the amount of £460.

In charging the jury the judge directed them to disregard the evidence as to the seven bills, but inadvertently said they might take into consideration the items of special damage. The jury returned a general verdict for £3,000 in favour of the plaintiffs. The Court of Appeal (as the House of Lords found) having wrongly ordered judgment to be entered for the defendants the plaintiff appealed to the House of Lords (Lord Finlay, L.C., and Lords Haldane, Atkinson, Shaw and Phillimore) and claimed that judgment should be entered in their favour for the amount of verdict less the sum of £460 which they consented to abandon. The defendants asked for a new trial on the ground of excessive damages. Their Lordships (Lords Atkinson and Phillimore dissenting) held that the case came within Ord. XXXIX. r. 6 (Ont. Jud. Act., s. 28), and that there had not been any substantial wrong occasioned by the misdirection, as the plaintiff agreed to the reduction from the verdict of the special damage proved in respect of the seven bills; and therefore there should not be a new trial, but judgment should be entered for the plaintiffs for the amount of the verdict less the £460. Their Lordships who dissented thought that there should be a new trial and that merely to reduce the damages as proposed was in effect invading the province of the jury.

CONTRACT—BUILDING CONTRACT—EXTRAS—WRITTEN ORDER OF ENGINEER—CONDITION PRECEDENT—DISPUTES ARISING OUT OF CONTRACT—ARBITRATION—POWERS OF ARBITRATOR.

Brodie v. *Cardiff* (1919) A.C. 337. This was an appeal from the decision of the Court of Appeal *In re Nott and Cardiff* (1918) 2 K.B. 146 (noted *ante* vol. 54, p. 432). By a building contract it was provided that disputes arising out of the contract were to be referred to arbitration. Disputes having arisen an arbitration took place, for the purpose of ascertaining the amount payable under the contract, which provided that extras were not to be paid for except when done on the written order of the engineer in charge. During the progress of the work the engineer required works to be done which he claimed were required by the contract but which the contractors contended were extras. The engineer refused to give any written orders for these items. The contractor carried out the work as ordered, and claimed to be paid as to the disputed items as for extras. The arbitrator found that the items were in fact extras, and that the contractors were entitled to payment therefor notwithstanding that the engineer refused to give a written order therefor. The Court of Appeal overruled Bray, J., who had held that the arbitrator had power to do as he had done, but the House of Lords (Lord Finlay, L.C., and Lords Atkinson, Shaw, Sumner and Wrenbury) have unanimously reversed the Court of Appeal and restored the order of Bray, J.

MAINTENANCE—CIVIL ACTION—SUCCESS OF MAINTAINED ACTION—ABSENCE OF SPECIAL DAMAGE.

Neville v. *London Express* (1919) A.C. 368. This was an appeal and cross-appeal by the plaintiff and defendants respectively from the judgment of the Court of Appeal (1917) 2 K.B. 564 (noted *ante* vol. 53, p. 425). The trial of the action before Lord Reading, C.J. (1917), 1 K.B. 402 is noted *ante* vol. 53, p. 425. The action was for libel and maintenance, but it is only in regard to the maintenance branch of the action that the appeals were concerned. The libel consisted of certain criticisms published by the defendants of a scheme for the sale of a tract of land by the plaintiff with the view of establishing a summer resort. The maintenance consisted in the defendants helping pecuniarily certain purchasers of lots to bring actions against the plaintiff to recover their purchase money. These actions had been successful, but the learned Chief Justice had held at the trial that the plaintiff was entitled to recover the costs he had been put to in defending the actions. The Court of Appeal held that an action for maintenance would lie notwithstanding the maintained action proved to be successful, but they ordered a new trial on the ground that the verdict was contrary to evidence and perverse. Both the plaintiff and defendants appealed from this decision to the House of Lords (Lords Finlay, L.C., and Lords Haldane, Atkinson, Shaw and Phillimore). The majority of their Lordships agreed with the Court of Appeal that the success of a maintained action is no bar to an action for maintenance, but Lords Shaw and Phillimore were of a contrary opinion. Lord Shaw is of opinion that the essential element of unlawful maintenance is the stirring up of strife, but aid in prosecuting a lawful claim cannot be unlawful maintenance. The subject of the law of maintenance is very learnedly and elaborately discussed, and very weighty reasons are adduced by their Lordships who dissent. But the majority of their Lordships held that the plaintiff, in order to succeed in an action of maintenance, must prove special damage and that the costs he had been put to in defending the maintained actions were due to his improperly defending those actions and could not be claimed as damages for which defendant was liable. The House of Lords therefore dismissed the action as regards the claim for maintenance and affirmed the order granting a new trial so far as it related to the claim for libel.

SHIP — CHARTERPARTY — TIME CHARTER — FRUSTRATION OF ADVENTURE—REQUISITION BY GOVERNMENT.

Bank Line v. *Capel* (1919) A.C. 435. In this case the question was whether or not a time charterparty had been put an end to by reason of the frustration of the contract by reason of circumstances supervening over which the parties had no control. The charterparty in question made in February, 1915, the defendants agreed to let a steamer to the plaintiffs, the charterers, for twelve months from the time the vessel should be delivered and placed at the disposal of the charterers at a coal port in the United Kingdom as ordered by the charterers to trade between safe ports within specified limits. The charterparty excepted loss or damage arising from restraint of princes. It also provided that if the steamer was not delivered on April 30, 1915, the charterers should have the option of cancelling the charter, and should it be proved that the steamer, through unforseen circumstances, could not be delivered by April 30, 1915, the charterers within 48 hours after receiving notice thereof should declare whether they cancel or will take delivery of the steamer, also that the charterers should have the option of cancelling the charterparty if the vessel should be commandeered by the Government. The vessel was not ready for delivery by April 30, 1915, but the charterers did not cancel the contract. On May 11 the vessel was requisitioned by the Government, and some effort was made by the charterers and owners, without success, to get the vessel released. These efforts ceased in June, 1915. In July, 1915, the owners received an offer to purchase the vessel subject to their being able to procure her release which they succeeded in doing in the following September by substituting another vessel. The charterers then commenced the present action for breach of the charterparty. Rowlatt, J., who tried the action, held that the requisitioning of the vessel by the Government operated as a frustration of the adventure, and put an end to the contract. The Court of Appeal reversed his judgment, and the House of Lords (Lord Finlay, L.C., and Lords Haldane, Shaw, Sumner and Wrenbury) have now reversed the decision of the Court of Appeal and restored the judgment of Rowlatt, J., dismissing the action, Lord Haldane dissenting.

Reports and Notes of Cases.

Province of Ontario

SUPREME COURT.

Appellate Division.] [45 D.L.R.

A. J. REACH CO. v. CROSLAND.

Easement—Right of way—Tax-sale—Effect.

A right of way appurtenent is extinguished upon a sale and conveyance of the servient tenement for arrears of taxes. Confirmation of the sale and validation thereof by statute has the effect of curing any defect in the method of assessment.

Taxes—Right of way—"Land."

A right of way appurtenant is not assessable as a separate interest in land, nor covered by an assessment of the dominant tenement; it is included in the "land" itself upon an assessment of the servient tenement.

Cooke for appellants. *Morley* for respondent.

ANNOTATION ON ABOVE CASE FROM 45 D.L.R.

The Easement of Way.

Ordinarily a right of way is a mere personal license: *Naegele* v. *Oke* (1916), 31 D.L.R. 501, 37 O.L.R. 61. In order that there may be a true easement it is necessary that there should be a dominant and a servient tenement, and that the easement should be connected with, and for the enjoyment of, the dominant tenement: *Rangeley* v. *Midland R. Co.* (1868), 3 Ch. App. 310. Where an easement is claimed by prescription, the owner of the dominant tenement in substance admits that the property of the servient tenement is in another, and that the right claimed is being asserted over the property of another; and therefore where the claimant to the easement has been asserting title to the property over which he claims the easement, and exercises rights of ownership thereon as his own property, he cannot claim an easement in respect of the exercise of such rights: *Att'y-Gen'l of S. Nigeria* v. *Holt*, [1915] A.C. 599 at 617, 618; *Lyell* v. *Hothfield*, [1914] 3 K.B. 911.

An incorporeal right cannot be appurtenant to an incorporeal right. It is said that there are exceptions to this rule, and that there is nothing incongruous in the owner of a several fishery, which is an incorporeal hereditament, having a right of way over the land adjoining for the purpose of exercising his right: *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401. See Armour on Real Property, p. 20.

A right of way "appurtenant" must be appurtenant to some particular parcel of land, and should refer in the grant to the dominant tenement: *Miller* v. *Tipling* (1918), 43 D.L.R. 469, 43 O.L.R. 88.

A way in the rear of a house held to be included amongst "easements or privileges appertaining" to the land and to pass as such: *Ennis* v. *Bell* (1918), 40 D.L.R. 3, 52 N.S.R. 31.

The general words "ways, rights, privileges and appurtenances," in deeds of land, do not include the inchoate enjoyment of a prescriptive right of way until the statutory period has run: *McLean* v. *McRae* (1917), 33 D.L.R. 128, 50 N.S.R. 536.

A right of way will not pass by implication as appurtenant to land under the general words of "ways, easements and appurtenances" where the strip over which the way is claimed had not been in use as a way *de facto* to the land conveyed: *Peters* v. *Sinclair* (P.C.) (1914), 18 D.L.R. 754, affirming (1913), 13 D.L.R. 468, 48 Can. S.C.R. 57.

A way of necessity does not arise merely to afford greater convenience of access; nor will it, in the circumstances, pass as an "appurtenant" on the principle of non-derogation from the grant: *Fullerton* v. *Randall* (1918), 44 D.L.R. 356.

An agreement by an owner of land granting a privilege, to an adjoining owner, for a term of years, to draw water from a spring on his land, is a personal license by the grantor, not an easement, and does not run with the land: *Naegele* v. *Oke* (1916), 31 D.L.R. 501, 37 O.L.R. 61.

A conveyance of land for mining purposes does not confer upon the grantee the right to carry on the excavations in derogation of a right to a passageway for cattle reserved in the deed: *Canada Cement Co.* v. *Fitzgerald* (1916), 29 D.L.R. 703, 53 Can. S.C.R. 263.

A right to go on abutting land to draw water from a well there situate may be the subject of an easement created by a partition agreement and evidenced by indicating the well and path to same running from the house on the adjoining lands on the plan accompanying the partition deeds; and such easement will be binding on parties subsequently acquiring the parcel on which the well is situate with notice of such plan and partition agreement: *Publicover* v. *Power* (1914), 20 D.L.R. 310.

Where adjoining owners construct their buildings according to a party-wall plan, and one is given a passageway to his building by means of a communicating door through the party wall, a valid easement is thereby created, independently of any grant or deed, to the stairways and passageways necessary for the proper use of his building, and it is co-extensive with and as durable as the easement of the party-wall: *Smith* v. *Curry* (1917), 36 D.L.R. 400; 42 D.L.R. 225.

An easement by prescription in a way, not appurtenant nor essential to the beneficial enjoyment of a dominant tenement, can be acquired only by an uninterrupted use for the full period of twenty years: *Salter* v. *Everson* (1913), 11 D.L.R. 832.

The doctrine of lost grant as applied to easements was not superseded by the Limitations Act (R.S.O. 1914, c. 75, and previous Acts), but before it can be applied there must be affirmative proof that a burden was imposed on the

servient tenement of the right claimed; the evidence of user sufficient to raise the presumption of a lost modern grant depends upon the circumstances of each particular case and where established non-user not amounting to abandonment does not destroy it: *Watson* v. *Jackson* (1914), 19 D.L.R. 733, 31 O.L.R. 481, referring to *Tilbury* v. *Silva* (1890), 45 Ch.D. 98, and *Re Cockburn*, (1896), 27 O.R. 450.

An easement by way of lost grant may be acquired by long user of a highway for carrying a stream across it for milling purposes, though the right could not be sustained as a prescription at common law, or under the Limitations Act (R.S.O. 1914, c. 75, s. 34), for want of continuity of user: *Abell* v. *Village of Woodbridge* (1917), 37 D.L.R. 352, 39 O.L.R. 382. This decision was reversed by the Appellate Division, Middleton, J., dissenting: see 15 O.W.N. 363.

It has been decided that the Statute of Limitations does not apply to easements: *Mykel* v. *Doyle*, 45 U.C.Q.B. 65 (followed in *Ihde* v. *Starr* (1909), 19 O.L.R. 471, 21 O.L.R. 407); *McKay* v. *Bruce* (1891), 20 O.R. 709; *Bell* v. *Golding* (1896), 23 A.R. (Ont.) 485 at p. 489. Consequently, there is no bar under the statute for not bringing an action to prevent disturbance of the right. But an easement may be extinguished or abandoned. And it is a question of fact in each case whether there has been an intention to abandon, and an abandonment of, the right.

Mere non-user is not of itself an abandonment, but is evidence with reference to an abandonment: *Jones* v. *Township of Tuckersmith* (1915), 23 D.L.R. 569, 33 O.L.R. 634 (reversed by Supreme Court of Canada: See memo 12 O.W.N. 368, 13 O.W.N. 383); *Publicover* v. *Power*, 20 D.L.R. 310, referring to *Ward* v. *Ward*, 7 Ex. 838; *James* v. *Stevenson*, [1893] A.C. 162 at p. 168. And so where there was continuous non-user and non-claim of a right of way accompanied by adverse obstruction by the erection of buildings upon the land over which the right was alleged to exist for eleven years, it was held that the owner of the dominant tenement had abandoned his right: *Bell* v. *Golding*, *supra*. Whether the acts done are done by the owner of the servient tenement acquiesced in by the owner of the dominant tenement, or by the owner of the dominant tenement himself, makes no difference. The abandonment may be presumed in either case if the facts are sufficient: *Bell* v. *Golding*, *supra*. And the owner of the dominant tenement may so use it as to prevent him from successfully maintaining an action to assert his right, in which case the servient tenement is discharged from the burden of the easement: *Anderson* v. *Connelly*, 22 T.L.R. 743.

An easement may also, of course, be released by conveyance. And if the dominant tenement is mortgaged, the mortgagor may release the right as far as he and those claiming under him are concerned, but the right will still subsist in the mortgagee. On payment of the mortgage and reconveyance of the land the right of the mortgagee disappears, and the easement is completely extinguished: *Poulton* v. *Moore*, [1915] 1 K.B. 400. See Armour on Real Property, p. 530.

An easement of way ceases upon the union and servient tenements: *Blackadar* v. *Hart* (1917), 35 D.L.R. 489; *Rosaire* v. *Grand Trunk R. Co.* (1912), 42 Que. S.C. 517. An easement also comes to an end when the purposes

for which it has been acquired or the means by which it is excerised become unlawful: *Wilson* v. *Smith* (1915), 22 D.L.R. 909.

The fact that a highway intervenes between the dominant and the servient estate is not a bar to the existence of a right of way as an easement: *Petipas* v. *Myette* (1913), 11 D.L.R. 483, 47 N.S.R. 270.

No such unity of possession is created by a lease of a dominant estate to the owner of a servient estate as to render s. 36 of the Limitations Act, 10 Edw. VII. c. 34 (Ont.), applicable to an action by the dominant owner to establish his right to use a prescriptive right of way, the use of which he reserved in such lease: *Thomson* v. *Maxwell* (1912), 3 D.L.R. 661.

The owner of the servient tenement of a servitude of passage liberates it by the extinctive prescription resulting from his possession for thirty years with no use of the right by the owners of the dominant tenement: *Hamelin* v. *Pepin* (1912), 42 Que. S.C. 276; *Goldstein* v. *Allard* (1912), 42 Que. S.C. 25.

Bench and Bar

CANADIAN BAR ASSOCIATION.

The annual meeting of the Association is fixed for August 29th, and is to be held at Fort Garry Hotel, Winnipeg. The following circular issued by the President gives detailed information in reference to the object of the Association, and the provisional programme for the meeting. Further information can be obtained from the Secretary-Treasurer, R. J. Maclennan, 156 Yonge St., Toronto:—

"This circular has several objects: (1) To request the members to remit the annual dues for 1919, namely $2. (2) To invite judges and lawyers who have not yet become members to join the Association, and (3) To give notice of the annual meeting to be held at Winnipeg on the 27th, 28th and 29th August next.

"The objects of the Association briefly stated are: (1) To advance the science of jurisprudence; (2) To promote the administration of justice; (3) To promote uniformity of legislation; (4) To uphold the honour of the profession, and (5) To encourage cordial intercourse among the members of the Canadian Bar.

"Membership is open to any member in good standing of the Bar of any Province, and to any judge or retired judge of Courts of Record in Canada. The annual dues, as above stated, are $2.00, and in remitting the members are asked to use the enclosed membership circular. In the case of firms one cheque for all the members will be appreciated.

"The officers are sometimes asked what advantage is derived from the payment of $2.00 for membership in the Association. The answer is, that such a lawyer is looking at the matter from the wrong point of view. The spirit of membership is not what can be got out of the Association by the individual, but how much his interest, co-operation and goodwill can further its objects, even if it is only by the payment of the small annual fee. Generally this explanation is followed by a membership remittance.

Accompanying this circular is a complete list of the officers and council and also of the standing and special committees. It necessarily follows that a great deal of the work of the Association must be done by correspondence, because it is not possible to have many general meetings. The first committeeman named in each Province is asked to act as a local chairman and be charged with the duty of actively assisting the general convener of the committee. It is also suggested that the Vice-President in each Province should be a general supervisor of all the committees in his particular jurisdiction, assisting them and encouraging them in their work.

"The provisional programme for the annual meeting is as follows:—

"Tuesday, 26th August.—Forenoon, conference of Commissioners on Uniform Laws; afternoon, meeting of the Council.

"Wednesday, 27th August.—Forenoon, official greetings from the Manitoba Premier and Mayor of Winnipeg, President's address, report of council, appointment of committees, Association luncheon; afternoon, legal education and general business; evening, the President's dinner to the Council, reception and garden party at Government House.

"Thursday, 28th August.—Forenoon, fire insurance and model policy, election of officers, luncheon and address; afternoon, legal ethics, company law, reception for the ladies of the party at Government House; evening, public address.

"Friday, 29th August.—Forenoon, administration of justice, unfinished business, report from council, luncheon at St. Charles Country Club; afternoon, continuation of unfinished business, meeting of council; evening, Association banquet at Fort Garry Hotel.

"It is expected that at each session one of the Vice-Presidents will assist the President in conducting the business. Outstanding lawyers are being invited from the United States and from England; announcement of these will be made later.

"The officers have not been able to secure reduced rates for transportation, because the railways are not to be interfered with in the work of returning our soldiers to their homes. Summer tourist rates, however, are available, and the eastern members should purchase return tickets to Winnipeg (or Vancouver, if they intend to take a trip to the Coast). The Secretary has been furnished with the following figures: Montreal to Winnipeg and return, $86.40; Toronto to Winnipeg and return, $67.95; Montreal to Vancouver and return, $130.85, and Toronto to Vancouver and return, $110.15. There are stop-over privileges, and for a small additional sum the travellers can make part of the journey by the Lake route.

"At the last meeting, which was held in Montreal, good progress was made in the development of the Association. The interesting addresses which were delivered and the discussions on Legal Education, Administration of Justice, Foreign Judgments, Succession Duties, Company Law, will appear in the Year Book, which has been delayed, but will soon be in the hands of the members.

"It is hoped that there will be a large attendance in Winnipeg in August. Those who desire information about hotel rates and reservations should communicate with Mr. J. M. DeC. O'Grady, of 305 Trust and Loan Bldg., Winnipeg, who is acting as a local Secretary, and will be pleased to give delegates all possible information."

ALBERTA LEGISLATION.

Mr. John D. Hunt, K.C., of Edmonton, Clerk of the Executive Council of Alberta, has prepared a synopsis of important Acts passed at the second session of the fourth legislature of the Parliament of that Province. He has kindly forwarded us a copy of his excellent summary.

No less than 52 statutes are digested, winding up with the usual Omnibus Act peculiar to modern legislation—the "Statute Law Amendment Act." This synopsis must have been a laborious work and will be useful to many; but in these days of electric light and defective vision we could have wished the type used had not been of such a minute character.

We notice the following suggestion by the compiler printed on the cover:—

"Every School District should be a little democracy, and the school house the social centre of the community, where all the

people come together in a neighbourly way on terms of equality to discuss among themselves their common interests and to devise methods of helpful co-operation."

The Anglo Saxon maw has a heavy task in Alberta in nationalising its large foreign population. Perhaps this is suggested as one way of helping its digestion.

Flotsam and Jetsam.

Distinction Between Simple and Gross Negligence.

Some courts and lawyers have contended that it is impossible to draw an instruction distinguishing between gross and simple negligence, if, in fact, there is any clear mark of separation that can be put in words, between these two terms. This confusion is a reflection on the ability of the Courts to administer the law. If the law provides for different grades of negligence and imposes a different measure of liability in each grade, the Courts must be prepared to state the distinction between these two grades of negligence with sufficient clearness to enable a jury to pass with some measure of intelligence on the facts before them.

We are, therefore, indebted to the Supreme Court of Massachusetts for undertaking to make this distinction. In the recent case of *Altman* v. *Aronson*, 121 N.E. 505, the question arose as to the measure of liability of a gratuitous bailee, who, in this case, was a vendee who returned to his vendor goods not called for by the contract of sale. The goods were lost by the express company and it was sought to make the defendant vendee liable on the ground that he marked the goods as being of less value than $50, when, in fact, they were worth many times that amount. It was admitted that the vendee in returning the goods was a gratuitous bailee, and as such was liable for only gross negligence, but the question arose over an instruction defining gross negligence. That part of the instruction which the Court held to be erroneous was as follows:—

"Now, if the ordinarily prudent man, in shipping goods, in dealing with his own property, would have shipped them by an express company, and would have shipped them upon an express receipt in which the value was limited to not more than a certain sum, if that would be what an ordinarily prudent man would have done under like circumstances and in a similar situation—if that is what these defendants did, of course, they are not liable. If, on the other hand, they did not deal with it as the ordinarily prudent

man, dealing with his own property under like circumstances, would have done, and if they were careless in not doing so, then the plaintiff would be entitled to a verdict in this case."

The Court held this instruction to be erroneous because "it imposed upon the defendants liability for simple negligence." The Court admits that the facts were sufficient to support a verdict for plaintiff, but insisted that the jury should be required to say whether it was gross negligence or want of good faith for defendant "to re-ship such a large quantity of silk with an excessive undervaluation." The Court then essays the difficult task of stating the proper distinction between these two terms. The Court says:—

"Gross negligence is substantially and appreciably higher in in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character, as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree, as compared with that present in ordinary negligence. Gross negligence is manifestly less watchfulness and circumspection than the circumstances require of a person of ordinary prudence. But it is something less than the wilful, wanton and reckless conduct which renders a defendant who has injured another liable to the latter even though guilty of contributory negligence, or which renders a defendant in rightful possession of real estate liable to a trespasser whom he has injured. It falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure. This definition does not possess the exactness of a mathematical demonstration, but it is what the law now affords."—*Central Law Journal.*

Canada Law Journal.

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THE TRIAL OF THE EX-KAISER.

As might be expected, as soon as it has been determined that the ex-Kaiser is to be tried for his crimes, voices are heard in protest. There is no precedent. It is not usual. He has broken no law. There is no jurisdiction. If he is tried he will be regarded as a martyr to the vindictive vengeance of his enemies. It is better to let him sink into obscurity. He has been punished enough already, etc., etc.

In view of these and other objections, it may be well to see what the present German Government has to say. In the Canadian Official Record of 26 June, 1919, there is a resumé of the German protest against the terms of peace. In chapter 4, concerning Reparation, they say: "Germany accepts the obligation to pay for all damages sustained by the civil population in the occupied parts of Belgium and France inasmuch as she has brought upon them the terrors of war *by a breach of international law through the violation of Belgian neutrality.*" This it may be observed is a candid admission that the invasion of Belgium was a violation of international law. To kill peaceful people, to render their wives widows and their children orphans, to rob them, to burn their houses and property, to violate their women, cannot, after all is said and done, ever be compensated by money however large the sum.

When we come to chapter nine this is what is said: "As to the trial of the Kaiser, Germany cannot recognize the justification of such criminal prosecution which is not founded upon legal basis, or agree to the competence of the special tribunal proposed, or the admissibility of the surrender to be requested of the Netherland. She cannot admit that a German be placed before a special foreign tribunal to be convicted as a consequence of an exceptional

law promulgated by foreign powers only against him as principles not of right, but of politics, and to be punished for an action which was not punishable at the time it was committed.

"Nor can she consent to a request being addressed to Holland to surrender a German to a foreign power for such unjust proceedings. As to the surrender of persons accused of violation of the laws and customs of war for trial by a military tribunal, even where proceedings have already been begun by German Courts, Germany is forbidden by her Criminal Code to make such extradition of German subjects to foreign Governments. Germany again *declares her preparedness to see that violations of international law are punished with full severity . . .*"

As we have seen, Germany admits in chapter 4 the violation of international law, and in chapter 9 is prepared to see such violations "punished with full severity," and yet the principal ringleader in the violation of Belgian neutrality, which resulted in wholesale murder, robbery, arson and rape, is not to be punished for his part in the outrage. This is obviously inconsistent.

As for making the ex-Kaiser and his satellites martyrs. It is quite true that there are some people in the world who have a maudlin sympathy for criminals, no matter how atrocious their crimes. We had an instance of that in Toronto quite recently. But in spite of all such sympathisers with criminals, the better opinion appears to be that criminals should be made to pay the penalty of their crimes, if only as a deterrent to others who have similar criminal propensities.

As for the place of trial of the ex-Kaiser and his confederates, Belgium, the scene of their principal crimes, seems the more appropriate place and yet their other violations of international law to be atoned for—the murder of Captain Fryatt and of the passengers on the Luisitania — may well be tried in London as proposed. The official reply to the German protest puts the matter in a fairly convincing way. It is as follows:—

"The allied and associated Powers have given consideration to the observations of the German delegation in regard to the trial of those chargeable with grave offences against international morality, the sanctity of treaties and the most essential rules of practice.

They must repeat what they have said in the letter covering this memorandum, that they regard this war as a crime deliberately plotted against the life and liberties of the people of Europe. It is a war that has brought death and mutilation to millions, and has left all Europe in terrible suffering. Starvation, unemployment, disease, stalk across that continent from end to end and for decades its people will groan under the burdens and disorganization the war has caused. They therefore regard the punishment of those responsible for bringing these calamities on the human race as essential, on the score of justice.

They think it not less necessary as a deterrent to others who, at some later date, may be tempted to follow their example. The present treaty is intended to mark a departure from the traditions and practices of earlier settlements which have been singularly inadequate in preventing the renewal of war. The allied and associated Powers, indeed, consider that the trial and punishment of those proved most responsible for the crimes and inhuman acts committed in connection with a war of aggression is inseparable from the establishment of that reign of law among nations which it was the agreed object of the peace to set up.

As regards the German contention that a trial of the accused by tribunals appointed by the allied and associated Powers would be a one-sided and inequitable proceeding, the allied and associated Powers consider that it is impossible to intrust in any way the trial of those directly responsible for offences against humanity and international right to their accomplices in their crimes. Almost the whole world has bonded itself together in order to bring to naught the German plan of conquest and dominion.

The tribunals they will establish, will therefore represent the deliberate judgment of the greater part of the civilized world. They cannot entertain the proposal to admit to the tribunal the representatives of countries which have taken no part in the war. The allied and associated Powers are prepared to stand by the verdict of history as to the impartiality and justice with which the accused will be tried. The ex-Emperor is arraigned as a matter of high international policy, as the minimum of what is demanded for a supreme offence against international morality, the sanctity of treaties and the essential rules of justice. The

allied and associated Powers have desired that judicial forms and judicial procedure, and a regularly constituted tribunal should be set up, in order to ensure to the accused full rights and liberties in regard to his defence, and in order that the judgment should be of the most solemn judicial character."

The law which was violated was in existence when the offence was committed. It is not an *ex post facto* law as the Germans suggest. When Canada was invaded by a band of Fenian scoundrels in 1866, those of them who were caught were tried as common criminals for violation of the law of Canada and sentenced to appropriate punishments. In what respect does the criminality of the Kaiser differ from that of those men except that the Kaiser's case was infinitely worse and accompanied by a thousand times more hideous cruelty and barbarity; for aught that appears to the contrary he consented to and authorized the outrage with full knowledge of the wrong he was committing and was thus an accessory before the fact to the murders and other outrages committed by his troops in Belgium.

Now ordinary people would like kaisers and chancellors and statesmen and generals and admirals to be made to understand that whatever may have been done or omitted to be done in the past ages of the world, they who commit and carry on such wholesale murders, robberies, arsons and rapes, as were committed in Belgium, do so at the peril of their lives, and the only way that lesson can be effectively taught is now to make the precedent. All things must have a beginning and the reign of law for sovereigns and statesmen and military advisers must have its beginning. If the precedent is made now the lesson may never need to be repeated.

Selected particular cases of crimes actually committed by German soldiers in Belgium should be made the subject of the indictment of the Kaiser and his principal advisers, and he and they should receive the punishment which, by the laws of Belgium, persons are liable to who commit murder, robbery, arson, and rape in that country.

The point of law to be solemnly affirmed is simply this, viz., hat those who invade a neutral country in defiance of international law are to be regarded as criminals in the country which

they invade, and that not only the persons who actually carry on the invasion are so criminally liable, but also all those who counsel, advise and direct the invasion to be made.

We observe that Von Bethmann-Hollweg has volunteered to stand trial for his part in the proceedings, and that Marshal Von Hindenburg is ready to assume all liability subsequent to 1916. How far the latter was responsible for bringing on the war remains to be seen. His offer to assume responsibility for acts of a later date will not relieve him from liability for prior misdeeds. Criminals are not usually permitted the privilege of selecting for what particular acts they shall be tried. It is needless to remark that the laws of Belgium against murder, robbery, arson and rape were not made *ex post facto*—but were in full force when they were violated wholesale by the ex-Kaiser and his fellow criminals.

INITIATORY PROCEEDINGS IN LITIGATION.

It used to be considered a matter of moment that litigants should initiate proceedings in the prescribed way, but it may almost be said that any formality on that point is in danger of disappearing, and we may soon be seeing the day when any parties having a dispute may, without the formality of any writ of summons or any other preliminary proceeding, just step into a Judge's room at Osgoode Hall, and move for judgment.

No less an authority than the Chief Justice of Ontario has declared: "It would be a startling thing, indeed, if, although a writ had not been issued, the parties had delivered their pleadings and gone down to trial and judgment had been pronounced and entered, the judgment must be held to be void because the action had not been commenced by the issue of a writ of summons, and the court which pronounced the judgment was therefore without jurisdiction." *Stothers* v. *Toronto General Trusts Corporation*, 44 O.L.R. p. 461. Mr. Justice Hodgins, who seems to be troubled by Rules of Court as to procedure, says: " 'Action' is defined in the Judicature Act, R.S.O. (1897), c. 57, s. 2 (3), as meaning a civil proceeding *commenced by writ*, and that has been held to include proceedings commenced by notice of motion

under Rules 938 *et seq.* But it has not yet been determined that it includes a civil proceeding begun by consent and of an informal character, and initiated in a way which is not laid down in the Rules."

Some little obstacle in the way of proceedings being carried to trial in the way the learned Chief Justice suggests might arise owing to the fact that, at all events, some officers of the court might have difficulty in passing a record in a proceeding in which no writ had been issued; they might, perhaps, conclude that there was really no action pending, and that the filing of a statement of claim or any other pleading in a case where no writ of summons had issued was a nugatory proceeding unwarranted by the practice of the court rightly interpreted.

It is quite possible, however, that some enterprising practitioner will seek to carry on litigation without the initiatory steps which the Rules prescribe, trusting to the dictum of the learned Chief Justice as a sufficient warrant for his proceedings. How far the *Law Stamp Act* may be thus evaded, however, does not appear at present to have been considered.

Practitioners desirous of adopting the simple and inexpensive plan of getting an adjudication of their cases without the troublesome procedure of issuing writs, or filing statements of claim or other pleadings, by just getting the counsel on the other side to step into a Judge's room and ask him to hear a motion for judgment, may thus be able to reduce the process of litigation in the Supreme Court of Ontario to a state of archaic simplicity.

From the earliest days in the history of English litigation the litigant was bound to bring his opponent before the court by due process, usually a summons from the Sovereign, "the fountain of law." In Chancery there was the subpœna to answer—but before the Judicature Act the latter formality had been superseded by a notice.

More recently we have, in Ontario, following this Equity practice, in some cases substituted a notice of motion, called an originating notice, as a mode of bringing an opponent before the court, but in England the old procedure by summons, even in such cases, is perpetuated.

Whether it is wise to dispense with the notice prescribed by the Rules seems doubtful, and yet the inclination of the Appellate Division appears to be in the line of treating an originating notice as unnecessary, if the parties choose to waive it. But the originating notice is intended to be not only a substitute for a writ of summons, but also for a statement of claim in an action, and for a Judge to dispense with an originating notice and accept the oral statement of counsel, is like waiving the filing of any pleadings in an action. And an order drawn up without anything on its face to shew how the Judge came to pronounce it, or on what claim or demand it is based, or, how the Judge came to have any jurisdiction to make it, would seem to be obviously defective,—and a record of such an order having nothing on the files of the court to support it, would be like a judgment pronounced without any writ of summons or pleadings, and but for the dictum of the learned Chief Justtice one would imagine to be about as valuable as a piece of waste paper.

In the anxiety of the court to escape from technicalities, it is possible to go too far, but as hard cases have often been found to make bad law, so also they may be found also to make bad practice.

The "slap dash" method of administering the law finds great favour with some lawyers but we venture to doubt whether it is a wise method for practitioners either to take themselves, or to invite complaisant judges to take.

PROPERTY AND CIVIL RIGHTS.

A legal journal is not concerned with the present agitation as to Prohibition, but we have a distinct duty as to the preservation of law and order and the conservation of the principles which have been instrumental in the maintenance of steadiness in the progressions and developments which must be part of the history of every nation, and which have been particularly noticeable in that of the British Empire; and these changes and developments will run their course as long as this Dispensation lasts. As to this development, a president of the Trades and Labour Council, on a recent occasion, said: "There can be no development but by the orderly progress of evolution."

These remarks are called forth by an article in a recent number of *Law Notes* (Northport, New York, U.S.A.), which contains so much common sense, that we gladly copy it:—

"Whatever one may think of the merits of the trade union movement, the patriotic attitude maintained during the war by its present head, Samuel Gompers, and his earnest efforts to check Bolshevist tendencies in his organization, give weight to his views on the present industrial situation. He is quoted as having said recently that the effect of prohibition is to cause a spirit of discontent among the laboring classes which furthers the spread of Bolshevism. Its practical working in this respect is beyond our province, but perhaps no man in the United States is in a better position than Mr. Gompers to know whereof he speaks on this point. From the theoretical standpoint, there is every reason why prohibition should engender Bolshevism, since the two are identical in spirit. The theory on which the American republic was founded is that civil liberty is the right of every man to do as he pleases except so far as his acts interfere with the enjoyment of like liberty by others. Opposed to that is the theory that any person or class of persons who may seize the power so to do may rightfully impose on their fellows such restrictions as whim or self interest may dictate. The victory of the allied powers on the bloody fields of France merely cut off one head of that hydra. Between rule by the Kaiser and his junkers, rule by the proletariat as expounded by Lenine, and rule by the pharisaical prohibitionists, there is no distinction in principle. So close is their identity that the decisions sustaining the prohibition laws are sufficient to sustain a large share of the Bolshevist programme if the ultra radical element ever gets control of a legislature. If industries lawful and respected for centuries may be wiped out by a stroke of the pen and individual rights in a recognized class of property destroyed without recompense, where is the stopping place? There are men who are as sincerely convinced that private ownership of land is iniquitous as any prohibitionist is of the evil of permitting the ownership of a quart of wine. If those persons succeeded in controlling a legislature long enough to destroy every landed

interest in the state, could the Federal Supreme Court honestly say that the decision in *Crane* v. *Campbell* (245 U. S. 304, 38 S. Ct. 98, 62 U. S. (Led.) 304) did not sanction the statute? The Bolshevist hates a church as heartily as the prohibitionist does a distillery. A confiscation of all church property would bring forth an anguished wail for constitutional protection, yet where is the distinction in principle between that and the legislation for which prayers of thanksgiving have been offered? 'Spirits and distilled liquors are universally admitted to be subjects of ownership and property.' License Cases, 5 How. 504, 12 U. S. (L. Ed.) 256. What greater sanctity can any piece of property in the United States claim? This time when an imported horde of anarchists is clamoring for an opportunity to pillage seems ill chosen for the breaking down of the constitutional protection of property rights."

SOME MATTERS OF PRACTICE.

A valued correspondent calls our attention to some matters of interest connected with professional matters which it is well to refer to. He notes the practice of many barristers who, acting as counsel for the Crown, sign indictments under the impression that their signatures thereto are essential. This would appear to be an improper practice and probably may have grown out of the former practice of Crown counsel, when submitting an indictment to a grand jury, of signing to the left in the margin, as an indication to the jury that the form of the indictment had been approved, but not as being essential thereto. He also refers to the too common practice of practitioners describing themselves in affidavits as barristers instead of solicitors. This is a small matter, but it is well for our brethren to be particular even in small matters. In the same connection it may be noted that in some offices suit papers are endorsed with the name of the firm as barristers, instead of solicitors for the plaintiff or the defendant, as the case may be.

UNIFORMITY OF LAW IN THE EMPIRE.

The question of making law more uniform throughout the Empire crops up from time to time, but little headway is made in the direction of greater uniformity. So far as the statute law is concerned, a fair degree of uniformity has been secured in some branches of mercantile law—such as the law of bills of exchange—but this covers only a small part of the field. The subject is much wider than merely securing identical legislation.

The problem of the best method of making law more uniform throughout a large number of communities which, whilst under one central Government for national or Imperial purposes, have wide powers of self-government in local matters is one that exists in America as well as in the British Empire. Judging by a thoughtful article in the May number of the *Yale Law Journal*, the problem in the United States is at least as urgent and difficult as in our own case. Notwithstanding—indeed, perhaps, by reason of—the differences in the two problems, a perusal of the article entitled "The Federal Courts and a Uniform Law," in which the American writer deals with his own problem, will be found instructive and stimulating to any English lawyer who is dissatisfied with the existing state of things in the British Empire. For, both in our Empire and in the United States, it is possible for courts of ultimate appeal to promulgate as binding decisions quite contradictory propositions. This ought not to be, and the reform of a system under which it is possible should be regarded as a matter of pressing importance.

The chief cause of the present lack of uniformity in American case law is the existence of a double set of courts—State and Federal—which to some extent work independently of each other. On most questions over which the State courts have jurisdiction the ultimate Court of Appeal is a State court, and the constitution does not at present permit appeals to be carried as a matter of course from a State court to a Federal court. The Supreme Court of the United States is not, therefore, the final appellate tribunal for all questions that come before the State courts. The result is that contradictory decisions on questions of (for instance) property law are frequently to be found in the American reports.

The decisions of the courts of one State are not binding on the courts of another State, and there is no ultimate appellate authority to decide between them. The remedy suggested by the writer of the article referred to is, shortly, that the decisions of the State courts should be subject to review by Federal courts. If that were done, the Supreme Court of the United States would eventually be the final appellate tribunal for the whole country, and a consistent and uniform body of case law would thus be in time created. This, it is expressly pointed out, would not interfere with the political or legislative independence of the individual States, nor with the creation of any statute law that might be considered desirable in any particular State or States.

Now, although the conditions of the British Empire differ in many respects from those of the United States of America, the problem of how to obtain uniformity in case law is at bottom the same for both British and American peoples. We have in our Empire many different systems of jurisprudence—Roman-Dutch, Mahomedan, etc.—and there is no question of interfering with these or replacing them with the common law. This particular feature is substantially non-existent in America. On the other hand, we have, in theory, made a considerable advance in the direction of a single appellate tribunal for the Empire. Nearly all decisions of nearly all courts in the oversea dominions are in the last resort subject to the right of appeal to the Privy Council, and the Privy Council is composed of nearly the same members as the House of Lords—the Appeal Court for the United Kingdom. The pity is that the theoretical side of this arrangement is not made at least equal to the practical side by formally amalgamating the House of Lords (as a Court of Appeal) and the Judicial Committee of the Privy Council into one appellate tribunal for the whole Empire. If this were done, a great step would be taken towards securing real and complete uniformity in case law throughout the Empire. Other steps too would be required to arrive at the goal of complete uniformity, and these would, no doubt, be taken without much difficulty when once a single appellate court for the whole Empire was set up. The chief obstacle in the way of all

reforms of this kind appears to be that the urgent need for them is not sufficiently appreciated either by the general public or leading statesmen.

The need for reform is, however, very urgent. It ought not to be possible that on the same point of law—apart from statute law—two courts in the Empire should arrive at diametrically opposite decisions, and that each of these courts should be right. Instances of this may not be very frequent—if they were, no doubt a remedy would at once be found—but their occurrence should be impossible. At present these contradictory decisions do occur sufficiently often to constitute a juridical scandal. In all branches of law, from mercantile law to constitutional, cases can be cited from the reports in which contradictory answers to the same question have been given by courts of the same Sovereign. The larger class of cases in which these conflicts occur consists of cases in which the English courts (including the House of Lords) differ from the oversea courts (including the Privy Council). A smaller class consists of cases in which the Privy Council differs from oversea courts.

That there should occasionally be divergence in the decisions of courts of co-ordinate jurisdiction is not remarkable, and it would not, therefore, be surprising to find the courts in England declining to be bound by oversea decisions. But that the courts in England (below the House of Lords) should not be bound by decisions of the Privy Council, the final appellate court for the oversea courts, is anomalous and inconvenient. The oversea courts are themselves bound by decisions of the Privy Council, and the result of the latter not being binding on the English courts is that one rule of law may prevail oversea and another in the United Kingdom. The inconvenience (though not the anomaly) is equally great in the case of the House of Lords itself and the Judicial Committee coming to different conclusions on the same point of law. This anomaly and inconvenience would, of course, at once cease to exist if both English and oversea courts had as their common appeal court of final resort such a tribunal as could be set up by amalgamating the House of Lords and Privy Council judicial bodies. In illustration of the conflict between English and oversea

courts it will be sufficient to refer to cases, one occurring in 1869 and another a year ago, in which two points of mercantile law have been decided in one way for the oversea dominions and in another way for the United Kingdom.

Rodger v. *Comptoir d'Escompte de Paris* (21 L. T. Rep. 33; L. Rep. 2 P.C. 393), was an appeal from the Supreme Court of Hong Kong, and the decision of the oversea court was reversed. The question at issue was as to the validity of an assignment of goods by indorsing the bill of lading, as against the right of the unpaid vendor to stop the goods *in transitu*. It was held by the Privy Council that a pre-existing debt was not a valuable consideration for the assignment, and that the vendor's right was not defeated. This, therefore, was established as the rule in this branch of mercantile law to be applied in Hong Kong and other oversea dominions whose final appeal court was the Privy Council. But in 1877 the same point came before the Court of Appeal in England, and the Privy Council decision was cited as authority: (*Leask* v. *Scott Brothers*, 36 L.T. Rep. 784, 2 Q.B. Div. 376). The Court of Appeal declined to follow *Rodger* v. *Comptoir d'Escompte de Paris*, and held that a pre-existing debt was sufficient valuable consideration to support the assignment and defeat the unpaid vendor's right of stopping the goods *in transitu*. Thus the proper rule of law to be applied in England is contrary to that applicable overseas with respect to the nature of the consideration for the assignment. The possibility of the House of Lords eventually overruling the Court of Appeal, and so making the rule on the subject alike in England and overseas, must, of course, be taken into account, and this element of uncertainty is a further disadvantage of the Privy Council decisions not being binding on English courts.

In 1906 the case of *Colonial Bank of Australasia* v. *Marshall* (95 L.T. Rep. 310; (1906) A.C. 559), came from the High Court of Australia on appeal to the Privy Council. The Australian Court had held that a banker was liable for the loss to his customer caused by the fraudulent alteration of a cheque, where the customer had so drawn the cheque by leaving blank spaces that it could easily be altered. This decision the Privy Council upheld, and

thus settled the rule on this point for all the oversea dominions as well as Australia. Last year a similar case came before the House of Lords on appeal from the Court of Appeal in England: (*London Joint Stock Bank* v. *Macmillan*, 119 L.T. Rep. 387; (1918) A.C. 777). It was held that the banker was not liable, and that the loss must fall on the customer himself. Thus, under such circumstances, a banker will be liable overseas, but not in the United Kingdom, unless in any of the oversea dominions an alteration in the rule is made by statute. The divergence between the House of Lords decision and that of the Privy Council in this instance is particularly striking, as the Court of Appeal had followed *Colonial Bank of Australasia* v. *Marshall* and was reversed by the House of Lords.

The smaller class of cases in which the Privy Council and the oversea courts have differed has chiefly been brought into existence by the provisions of the Australian Commonwealth constitution, by which the High Court of Australia, and not the Privy Council, is made the ultimate court of appeal in matters relating to the interpretation of the constitution. In *Webb* v. *Outrim* (95 L.T. Rep. 850; (1905) A.C. 81), the Judicial Committee disagreed with the High Court of Australia's decision in *Deakin* v. *Webb* (1904, 1 Commonw. L. Rep. 585), on a matter relating to the interpretation of the Australian constitution, and in *Baxter* v. *Commissioners of Taxation* (1907, 4 Commonw. L. Rep. 1087), the High Court of Australia definitely declined to accept the views of the Privy Council. Even if no such further disagreements occur between the Australian court and the Judicial Committee—and Australian legislation will probably prevent this—the setting up of the Australian court as the ultimate interpreter of the constitution of a component part of the Empire is an evil in itself. Apparently there is no direct remedy available, but it would be a gain to the Empire as a whole if an appellate court could be set up in London which would so command the respect of Australia as to bring about the abrogation of such of the provisions of the constitution as prevent appeals on constitutional points being carried further than the High Court of Australia. This seems the more desirable, because, apart from the disagreements already

referred to, the Privy Council has shewn a disposition to resist the view that is making way overseas and elsewhere—that each Dominion is in effect, and is to be treated as, a corporate entity: (see *Williams* v. *Howarth*, 93 L.T. Rep. 115; (1905) A.C. 551, reversing the Supreme Court of New South Wales) and with this case compare such cases as *Municipal Council of Sydney* v. *Commonwealth* (1904, 1 Commonw. L. Rep. 208, 231) and *Baxter* v. *Commissioners of Taxation* (1907, 4 Commonw. L. Rep. 1087, 1126). Possibly a new appellate court of the right calibre would do what it has been said "the Lords of the Judicial Committee must sooner or later" do—that is, "recognise that Dominion and Commonwealth, Provinces and States, being living members of one Empire and perfectly real persons in political fact, have to be so treated in law." It certainly will not make for uniformity in law if we have the Privy Council propounding one theory of sovereignty in the Dominion and the High Court of Australia another.—*Law Times.*

WAR CRIMINALS.

There seems to be no question, but that offenders against the law and customs of war as carried on between civilized nations are responsible and liable to punishment. Such offences are crimes, that is, acts forbidden by law under pain of punishment. The articles in the Peace Treaty which refer to this are as follows:—

ARTICLE 227.

The Allied and Associated Powers publicly arraign William II. of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy, and Japan.

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.

ARTICLE 228.

The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office, or employment which they held under the German authorities.

ARTICLE 229.

Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.

Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned.

In every case the accused will be entitled to name his own counsel.

ARTICLE 230.

The German Government undertakes to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders, and the just appreciation of responsibility.

The following summary of the most important and most atrocious of these criminals is taken from a daily paper, and will be of interest, when the time comes for their trial:

"The most important of these men is, of course, William Hohenzollern, although it is not known that any names were mentioned to the German plenipotentiaries at the time. Nor have any names but his been officially mentioned since, although it is easy to guess some of them at least. For instance, the Crown

Prince is sure to be asked to answer to his name in a London court. He might be charged with wholesale robbery and the rape of a countryside, or, as is more probable, an effort might be made to determine his responsibility for the war and the violation of treaties. Equally sure is it that the Crown Prince Rupprecht of Bavaria will be put on trial. He was the strongest hater of the British among the German generals, and is reported in an official document to have ordered his men to take no British prisoners. He is held responsible for the execution of British prisoners that were taken by his army and was responsible for the deportation of the population of Lille, Turcoing and Roubaix.

Rupprecht was perhaps the best general, the most competent, if also the most ruthless soldier among the German royalties who fought or directed in the war. Between him and the Crown Prince of Prussia there appears to have been constant ill-feeling, and it has been reported that on more than one occasion when they held different views of military operations, Hindenburg preferred the judgment of Rupprecht. This is not surprising, since the Bavarian is a man ten years older than the Prussian, was a more serious-minded soldier, and on several occasions had to supply his young kinsman with reserves when the Prussians had got themselves into difficult positions. His character seems to have a streak of calculated cruelty which is not conspicuous in the character of the former heir to the German Crown, who was rather immoral and callous than savage and vindictive. Therefore, Rupprecht will be among the ex-royalties who may be expected to have the opportunity to shew cause why the sentence of the court should not be carried out.

It is taken for granted that Hindenburg, Ludendorff, Tirpitz and Bethmann vol Hellweg will be called. There can be no doubt that they had a certain responsibility for the conduct of the war, and perhaps for the events leading up to the invasion of Belgium. Another Cabinet Minister who is likely to be demanded by the Allies is Von Capelle, who followed Von Tirpitz as Minister of Marine. He pinned his hopes on the success of the submarine campaign, which was carried out with renewed vigour under his auspices. There will also be several submarine commanders summoned to the bar, and among them will certainly be Von Forstner and Wilhelm Wernher, both of whom were decorated by the Hohenzollern for some atrocity. Several of the submarine commanders, perhaps most of them are no longer within the jurisdiction of any earthly court. Commander Max Valentiner is supposed to have commanded the U-boat which

sank the Lusitania, but whether he is living is uncertain. This man, by the way, is the son of the Dean of the Sondersburg Cathedral, and was credited with having sunk no fewer than 128 vessels.

Mackensen, the man who did so much to break the heart of Russia, and who conquered Serbia and Rumania is also to be extradited. He will be charged with the monstrous crimes which accompanied the invasion of Rumania in 1916, when the country was stripped of the necessities of life and hundreds of prisoners were executed. After the war he was interned in Hungary with his army for attempting to violate the terms of the armistice. He is now in the hands of the Allies, it is believed, and can be produced on a few days' notice. He and Hindenburg are the only holders of the Grand Cross of the Iron Cross, and it may be that his age will save him as it may protect Hindenburg and Tirpitz from capital punishment. Another German general against whom a long score has been run up is Otto von Below, the most prominent item being the burning of Ardenne and the execution of one hundred people. Gen. Liman von Sanders, in command of the Turkish campaign in Mesopotamia, will be accused of ordering or sanctioning the massacres in Armenia and Syria. Baron Oscar von der Lancken is held partly accountable for the execution of Miss Cavell and Capt. Fryatt, for he was head of the German political department in Brussels, and it was to him that the appeals were made on behalf of these prisoners.

It will be remembered that after the armistice von der Lancken was appointed with Dr. Reith, who had been prominent in the German occupation of Belgium, to confer with Mr. Hoover about food supplies for Germany, and that Mr. Hoover sent back the brief message that they could 'go to hell,' and that if he had to deal with Germans it would not be with that pair. Another commander who is to be held partly responsible for the murder of Miss Cavell is Baron Kurt von Manteuffell, military commander of Louvain. Gen. von Schroeder was the military officer immediately responsible for the shooting of Capt. Fryatt. There will be several officers tried for brutalities to prisoners, among them Gen. Olsen and Gen. von Cassel, who were in charge at Doberitz. Lt. Rudiger was in charge at Ruhleben, Major von Goertz at Madgeburg and the brothers Niemeyer at Holzminden and Clusthal. One of the latter was a German-American and was particularly brutal to British prisoners."

ST. GEORGE AND THE DRAGON.

In days of old, a dragon fierce,
Did from his foul and loathsome den
Steal forth and havoc make of men.
His eyes were keen, his claws were sharp,
His mouth was reeking red with blood,
His savage heart by pity was unmoved,
And moans and shrieks were music to his ear.
Equipped by Hell with every hellish power,
He ravaged and he killed and did devour
All who within his fearful clutches came,
And woe and misery followed in his train.

The gallant Knight, Saint George, no sooner heard
The fearful story of the monster beast
Than he resolved the world of it to rid.
Mounted on gallant steed and fully armed
With shield and sword, breast plate and helmet, too,
He on his bosom bore the conquering sign,
And thus apparell'd sallied forth to war.

No sooner on the noxious beast he came,
Than straight the fight began with deadly force.
The dragon every cunning art essayed
To lure the valiant Knight within his power.
But he, most wary, all these arts o'ercame
And ever and anon a mighty stroke brought home
Upon the monster's head or through his body drove
His sharp two-edged sword with all his might,
Until at last by many weighty blows
The noisome beast lay prostrate at his feet.
Then from a stricken world the shout went forth
"Rejoice, the dragon's slain."

Once more in this poor World a dragon is abroad,
More venomous, more hellish than of yore,
By Devil furnish'd well with every art
And every foul device his ends to gain.
For forty years within his den he lurk'd
Preparing for "the Day" when he should spring
Upon a careless unsuspecting world,
For which the hideous monster look'd with glee.
Alas! that Day has dawned and this sad world beholds
The cruel monster raging through the earth,
And this vile beast which erstwhile look'd so fair
Now to mankind its true self doth declare—
A child of Hell.

Once more St. George hath armed him for the fray,
And once again goes forth the foe to slay.
Upon his breast the conquering sign he wears
And with courageous heart to heaven he swears
To conquer or to die—his thrice cross'd flag unfurl'd
He now stands forth the champion of the World.

Let all true men with one accord
Their utmost aid to him afford,
For none but recreant hearts can play
A neutral part in this great Day.
O Lord of Hosts his arm uphold,
The mystery of Thy will unfold
That soon a tortur'd world again
May shout with joy "the Dragon's slain."

L'ENVOI.

With rancorous rage the monster foul did fight,
And from his mouth came forth a deadly blight.
No devilish deed conceived beneath the sun
Was found too base for him to leave undone.
And all the arts of Hell he did array
Against that fearless Knight, to gain the day
And other three as hateful to the sight
To help him, strove with all their might.
For many months the contest fierce did rage
And ebb'd and flow'd with varying success.
As, like the rolling wave, the monster beast
Did hurl himself with all his brutal force
Against that gallant Knight, him to o'ercome.
And all the world did fairly stand aghast
Lest evil over virtue should prevail.
But when the fight against the Knight did go
Angelic voices whispered in his ear,
"Fight on brave heart, for we are near
And in good time the waiting world shall see
The crowning victory shall rest with thee."

Meanwhile from widow'd hearts did prayers ascend
In constant stream to God for that brave Knight;
And all who virtue loved came to his aid.
At length the reptile comrades of the beast
Shrunk sorely wounded one by one away,
And with a stroke supreme the dragon's head was crush'd
And weltering in a sea of blood the victim lay.
Then echoed through the world the glad refrain,
"Let every soul rejoice, the Dragon's slain."

—GEO. S. HOLMESTED.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

DOMINION OF CANADA—MUNICIPAL WATER SUPPLY—DOMINION GOVERNMENT BUILDING—IMPLIED OBLIGATION TO PAY FOR WATER SUPPLIED—TAXATION—B.N.A. ACT (30 & 31 VICT. C. 3), S. 125.

Minister of Justice for Canada v. *Levis* (1919) A.C. 505. This was an action for a mandamus to the City of Levis to compel it to supply water from the municipal waterworks to a building in the city belonging to the Dominion Government. The city was ready and willing to supply the water at and for an annual charge of $300 which the Courts below found to be a reasonable charge; but the plaintiff claimed that it was a tax, and by the B.N.A. Act, s. 125, the Dominion Government was free from municipal taxation in respect of its property; the plaintiff also claimed that the proposed charge of $300 was excessive and unreasonable, and that $35 per annum was all that the supply was actually worth. The Judicial Committee of the Privy Council (Lords Sumner, Parmoor, and Wrenbury, J.), dismissed the appeal agreeing with the Superior Court of Quebec, that the exoneration of the Dominion Government from liability for municipal taxes did not extend to exempt it from liability for charges for water supplied from municipal waterworks, as to which there was an implied obligation on the part of the Government to pay. They also agreed that the proposed charge of $300 was not, in the circumstances, an excessive or unreasonable charge.

PRIZE COURT—ENEMY SHIP—OUTBREAK OF WAR—SEIZURE IN PORT—DAYS OF GRACE—FORCE MAJEURE—HAGUE CONVENTION NO. VI. ART. 2.

The Turul (1919) A.C. 515. In this case the Judicial Committee of the Privy Council (Lords Sumner, Parmoor, Wrenbury, Sterndale and Sir Arthur Channell), decide that where, on the outbreak of the war, a vessel was seized in an Australian port and her papers and charts were removed and a watchman placed on board; and after the seizure was made a proclamation was issued granting enemy ships a period in which to depart, but the Master was not informed by the proclamation, or otherwise, that upon his applying for a pass the ship would be put in a position to depart in consequence whereof the vessel remained in port beyond the

days of grace; in such circumstances that the ship was unable to leave by "circumstances beyond its control" (*force majeure*), within the meaning of art. 2 of the 6th Hague Convention and therefore was not liable to condemnation.

PATENT — PATENT AMBIGUITY — EVIDENCE OF USER — FALSA DEMONSTRATIO.

Watcham v. *Attorney-General* (1919) A.C. 533. This was an appeal from the Court of Appeal for Eastern Africa. The main question turned upon the construction of a Crown patent made in 1897, whereby a "piece of land delineated on a plan hereto attached situate in the railway zone and containing 66¾ acres or thereabouts being in extent" (*setting out a description by boundaries*) was conveyed. There was in fact no plan attached, and the boundaries included about 166 acres. The question which the Judicial Committee of the Privy Council (Lords Loreburn, Atkinson, Scott, Dickson and Sir Arthur Channell) were called on to decide was whether the extent of the property conveyed by the patent was to be fixed by the description of its boundaries or the description of its area. Their Lordships held that the rule adopted for the construction of an ancient document wherein a latent ambiguity occurred applied also to a modern deed wherein an ambiguity appeared whether patent or latent, viz., that extrinsic evidence might be adduced to shew how the grantee had himself construed the deed; and it appearing in this case that the defendant had by admissions shewn that he did not claim as within his grant the land now sought to be included therein, the Court was right in treating the description by boundaries as *falsa demonstratio*, and in construing the grant as limited to an area of 66¾ acres.

ARBITRATION—AWARD—MOTION TO ENFORCE AWARD—REFUSAL TO ENFORCE—ARBITRATION ACT, 1889 (52-55 VICT. C. 49), S. 12—(R.S.O. C. 65, S. 14).

In re Boks & Co. and *Peters* (1919) 1 K.B. 491. This was a summary application to enforce an award under s. 12 of the Arbitration Act, 1889 (see R.S.O. c. 65, s. 14). The award related to a contract made January 17, 1918, for the sale of palm kernels; and it appeared by an order of May 1, 1917, made by the Minister of Munitions, trade in palm kernels was forbidden except under license. No license was produced authorizing the sale in question and subsequently to the date of the award the buyers discovered

that no license had been in fact granted. In these circumstances Lush, J., reversed the order of the Master to enforce the award, and the order of Lush, J., was affirmed by the Court of Appeal (Eady, M.R., and Scrutton, J.), the court being of the opinion that it was not a case for the summary enforcement of the award, but that the parties should be left to enforce it by action if so advised.

PRINCIPAL AND AGENT—CONFIDENTIAL COMMUNICATION—DUTY OF SECRECY—BREACH OF DUTY—LIBEL—DAMAGES—EX TURPI CAUSA NON ORITUR ACTIO.

Weld-Blundell v. *Stephens* (1919) 1 K.B. 520. This was an action by a principal against his agent to recover damages for an alleged breach of duty in the following circumstances: The plaintiff had been asked to advance money to a company, and for the purpose of considering the application he employed the defendant, who was an accountant, to examine the accounts of the company, and in a letter of instructions, he made certain libellous statements against persons who were, or had been, officially connected with the company. This letter the defendant handed to his partner who negligently left it lying in the company's office, where it was found by the manager and read by him, and its contents communicated to the persons libelled, who thereupon brought an action against the plaintiff and recovered judgments aggregating £1,850; this sum, with the costs of the libel action, the plaintiff now claimed to recover from the defendant. The action was tried by Darling, J., who held that the defendant was not under any implied obligation to keep the letter secret, and that the plaintiff could not in any case recover damages to indemnify himself against his own wrongful act. The Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.), were of the opinion that the defendant was under an obligation to keep the letter of the plaintiff secret and on this point reversed the judgment of Darling, J., but the Court of Appeal were divided on the question of damages, the majority (Bankes and Warrington, L.JJ), however, substantially agreed with Darling, J., and held that the plaintiff was only entitled to recover nominal damages, as the damages recovered against him in the libel actions were really occasioned by his own wrongful act for which he was not entitled to be indemnified by the defendant. Scrutton, L.J., on the other hand, thought that the plaintiff was entitled to recover substantial damages. He says: "My brothers, while thinking the agreement legal and one

they could enforce before breach, will not enforce it after breach by giving the damages caused by its breach and to prevent which it was made."

CRIMINAL—OBTAINING MONEY BY FALSE PRETENCES—SALE—FRAUDULENT STATEMENTS TO INDUCE PURCHASE.

The King v. *Sanders* (1919) 1 K.B. 550. This was an appeal from a conviction for obtaining money by false pretences in the following circumstances: The appellant sold to the prosecutor for £70 two mares which he represented were sound and in foal. It was agreed that if the mares were not as warranted the prosecutor should have the right to return them within fourteen days. The mares were, to the knowledge of the appellant, not as warranted in any respect. The prosecutor having failed to get back his £70 did not return the mares. The appellant was charged on indictment with obtaining £70 by false pretences and convicted and the Court of Criminal Appeal (Bray, Avory and Sankey, JJ.), held that the conviction was right. The prosecutor's wife had written to the appellant demanding back the money, and counsel for the Crown had proposed in his opening speech to read the letter, but objection was made and sustained. Subsequently the prosecutor, when called as a witness, was questioned about the letter and no objection was then raised, and the Court of Appeal refused to entertain on appeal an objection to the admissibility of such evidence, it not having been taken at the trial. See *Rex* v. *King*, 16 O.W.N. 314, a somewhat similar case.

TREES OVERHANGING ADJOINING PREMISES—RIGHT OF NEIGHBOUR TO PICK FRUIT FROM OVERHANGING BRANCHES—CONVERSION.

Mills v. *Brooker* (1919) 1 K.B. 555. The relative rights of the owner of a tree whose branches overhang an adjoining property to the fruit growing on such overhanging branches, must have been a question which must have often arisen, and yet up to the present time it does not appear to have been the subject of judicial decision. It has been determined that the adjoining owner has a right to lop off the overhanging branches, *Lemmon* v. *Webb* (1895) A.C. 1, and upon the strength of that right the defendant in this case thought he had the right to pick off apples, which he did to the value of £10, for which amount the County Court Judge who tried the action gave judgment for the plaintiff, and a Divisional Court (Avory and Lush, JJ.), affirmed his decision.

CRIMINAL LAW—RECEIVING—MONEY TAKEN BY WIFE FROM HUSBAND—EVIDENCE OF THEFT BY WIFE—"LIVING TOGETHER"—HUSBAND SERVING IN ARMY—LARCENY ACT, 1916 (6-7 GEO. V., C. 50), SS. 33 (3), 36—(CR. CODE, S. 354: 1913, C. 13, S. 15).

The King v. *Creamer* (1919) 1 K.B. 564. This was an appeal from a conviction for receiving property knowing it to have been stolen in the following circumstances: The property in question consisted of money left by a soldier in the custody of his wife, he being on service in France. Some time before November, 1917, she broke open the box containing the money. She subsequently in December, 1917, or January, 1918, commenced an adulterous intercourse with the accused, and in May, 1918, left her husband's home and went to live with the accused as man and wife. There was evidence that the accused had received some of the money, but when does not appear from the report. His defence was that he believed it to belong to the wife. He was convicted. On the appeal it was argued that so long as the wife was living with her husband there could be no larceny by her of her husband's property, unless it was taken with the intention of deserting him, and of this there was no evidence, and there being no theft there could be no receiving within the Larceny Act, 1913 (6-7 Geo. V. c. 50), ss. 33 (3), 36. (See Cr. Code, s. 354, as amended by 1913, c. 13, s. 15), and the Court of Criminal Appeal (Darling, Avory, Shearman and Sankey, JJ), upheld this contention and quashed the conviction, the court holding that the wife must be deemed to have been living with her husband although he was temporarily absent on military service, so long as she remained in her husband's home and had not committed adultery. The court, however, intimated that had the judge at the trial properly directed the jury they might have found facts displacing the protection afforded by s. 36.

CRIMINAL LAW—PROSECUTION—NO CASE—OBJECTION OVERRULED—EVIDENCE FOR DEFENCE INCRIMINATING DEFENDANT.

The King v. *Power* (1919) 1 K.B. 572. This was also an appeal from a conviction. At the trial, at the conclusion of the evidence for the prosecution, the counsel for the appellant objected that no case had been proved. The objection being overruled the appellant and his co-defendant gave evidence and the latter was cross-examined by the appellant's counsel and incriminated the appellant and he was convicted. On behalf of the latter it was argued

that the objection taken on his behalf at the close of the case for the prosecution was wrongly overruled and, notwithstanding the evidence of the co-defendant, ought to be given effect; but the Court of Criminal Appeal (Darling, Avory, Lush, Shearman, and Sankey, JJ.), held that the court could not properly disregard the evidence for the defence and the conviction was affirmed, a prior decision of Darling, J., in *Rex* v. *Joiner*, 4 Cr. App. 64, being overruled; and *Rex* v. *Fraser*, 7 Cr. App. 99, 101, being followed.

SHIP REQUISITIONED BY ADMIRALTY—CHARTERPARTY—NAVIGATING WITHOUT LIGHTS IN COMPLIANCE WITH ADMIRALTY REGULATIONS—COLLISION—LOSS OF SHIP—CONSEQUENCE OF HOSTILITIES OR WARLIKE OPERATIONS—"CAUSE ARISING AS A SEA RISK."

Britain S.S. Co. v. *The King* (1919) 1 K.B. 575. This was a petition of right on a charterparty to recover for the loss of the vessel. The vessel had been requisitioned by the Admiralty, and by the charterparty the Admiralty took the risk of "all consequences of hostilities or warlike operations" but was not to be liable for collision or any other cause arising from sea risks. The ship was navigated at night without lights pursuant to the Admiralty regulations, and while so navigating came into collision with another vessel also navigating without lights, and also lost. Bailhache, J., who tried the action, held that the loss was not occasioned by hostilities or warlike operations, but was due to other cause arising as a sea risk and therefore that the action failed.

CONTRACT—ILLEGALITY—COVENANTS IN RESTRAINT OF PERSONAL FREEDOM—PUBLIC POLICY—COVENANT ENTERED INTO WITH OBJECT OF PAYING CREDITORS—13 ELIZ. C. 5 (R.S.O. C. 134, S. 5).

Trustee v. *Denny* (1919) 1 K.B. 583. This was an action to set aside a deed as fraudulent as against creditors and contrary to public policy in the following circumstances: A father being anxious to save his son (who was of extravagant and dissolute habits) from moral and financial ruin, made an arrangement with him whereby the son transferred to the father all the property he had, and the father agreed to pay all the son's debts, amounting to £4,000, and to redeem and hand over to him all articles then in pawn in value of £500 or more and pay the son £800 a year on condition (a) that he did not become bankrupt or alienate the annuity, or make any composition with his creditors, (b) amend his

way of living, (c) give up certain associates, (d) did not reside within 80 miles of London, (e) did not drink alcoholic liquors to excess, (f) did not borrow or bet or have any relations with money-lenders or bookmakers. The object of the deed was to save the son and for a time it had some effect, but subsequently he began to borrow again and was made bankrupt on petition of a money-lender, who was his chief creditor. The action was brought by the Trustee in Bankruptcy to set aside the deed. Sankey, J., who tried the actions, held that there was a good and valid consideration for the deed, and that none of the conditions imposed on the son were contrary to public policy, and that the deed so far from being any contravention of the 13 Eliz. c. 5 was made for the purpose of paying all the son's creditors, and that this object was in fact achieved.

ADMIRALTY—INTERNATIONAL LAW — JURISDICTION — IMPLEADING FOREIGN SOVEREIGN POWER—STATUS OF ESTHONIAN GOVERNMENT—PROVISIONAL RECOGNITION OF DE FACTO GOVERNMENT—INTERNATIONAL COMITY.

The Gagara (1919) P. 95. This was an application to set aside a writ in *rem* claiming possession of a vessel in the possession of the Esthonian Government which had put in to a British port. The vessel had originally been in the Russian Imperial Service, but had been seized and appropriated by the Bolshevik Government, and had thereafter been seized and condemned as prize by the Esthonian National Council. The plaintiffs claimed title under the Bolshevik Government. Hill, J., having been informed by the law officers of the Crown that the Esthonian Government had been provisionally acknowledged by His Majesty as a *de facto* sovereign power, held that the court had no jurisdiction to compel that power to implead in a British court and accordingly granted the application and set aside the writ.

ADMIRALTY—JURISDICTION—FOREIGN SHIP—ACTION FOR POSSESSION—STATUS OF PROVISIONAL GOVERNMENT OF NORTHERN RUSSIA—RECOGNITION OF SOVEREIGNTY.

The Annette (1919) P. 105. This was a somewhat similar case to the last. The plaintiffs were Esthonian subjects and with the consent of the Esthonian Government claimed possession of two vessels in a British port which had been requisitioned or sequestered by the Provisional Government of Northern Russia under whom the defendants claimed. The Provisional Government

entered an appearance under protest and now applied to set aside the writ. From information received from His Majesty's Government it appeared that the Provisional Government of Northern Russia had not been recognized by His Majesty's Government. In this case, therefore, the motion was refused by Hill, J.

WILL—CONSTRUCTION—GIFTS TO NEPHEWS AND NIECES "AND THEIR ISSUE IN STIRPES"—STIRPITAL DIVISION WHEN IT COMMENCES.

In re Alexander, Alexander v. *Alexander* (1919) 1 Ch. 371. The construction of a will was in question in this case; by it the testator gave a fund in trust for certain persons for life and then "in trust for such of my nephews and nieces living at the death" of the last surviving tenant for life "and for the issue then living of such nephews and neices of mine who may have previously died . . . and if more than one as tenants in equal shares per stirpes." The testator had four brothers and nineteen nephews and nieces, children of these brothers: fourteen of these survived the last tenant for life and five predeceased her, leaving issue, some of whom survived the last tenant for life, and some of whom died leaving issue who survived the last tenant for life. The first question raised was as to the meaning of the word "issue" and Sargent, J, held that it was not confined to children but included issue of all degrees; and that as between issue in the same line of descent, of different degrees, the nearer excluded the more remote, and that issue took as tenants in common and not as joint tenants. The remaining question was as to the time when the stirpital division was to begin. And as to this Sargent, J., held that the fund was divisible into 19 parts, according to the number of the nephews and nieces who survived the period of distribution either by themselves or their stocks.

VENDOR AND PURCHASER—AGREEMENT—SIGNED BY AGENT LAWFULLY AUTHORIZED—OMISSION OF TERM—WAIVER—SPECIFIC PERFORMANCE—STATUTE OF FRAUDS (29 CAR. 2 C. 3), S. 4 (R.S.O. C. 102, S. 5).

North v. *Loomes* (1919) 1 Ch. 378. This was an action for the specific performance of a contract for the sale of land in which the Statute of Frauds was set up as a defence. First, it was alleged that there was no writing properly signed by the purchaser or his agent, and, secondly, that if there was an agreement it was incomplete as it did not set out all the terms. The contract was in the

first place verbal accompanied by the payment of £50 deposit, for which the vendor, the plaintiff, gave the defendant a receipt, which the defendant sent to his solicitor with instructions to carry out the contract. The plaintiff's solicitor then sent a draft contract to the defendant's solicitor which the latter returned with a letter signed by himself stating that no further contract was necessary as the one which plaintiff had signed was sufficient. Younger, J., held that this letter of the defendant's solicitor was a sufficient note or memorandum to satisfy the statute. It appeared that one of the terms of the bargain was that the defendant was to pay all costs attending the sale, and it was contended on behalf of the defendant that the omission of this term rendered the agreement incomplete and therefore not specifically enforceable; but the vendor waiving this term it was held its omission was immaterial, as it was a term solely for his benefit.

ANCIENT LIGHTS—THREATENED OBSTRUCTION—QUIA TIMET ACTION FOR INJUNCTION—DECLARATORY JUDGMENT WITH LEAVE TO APPLY FOR INJUNCTION—COSTS.

Litchfield-Speer v. *Queen Anne's Gate Syndicate* (1919) 1 Ch. 407. This was an action to restrain a threatened interference with the plaintiff's ancient lights. The defendants were engaged in erecting a building on their premises which the plaintiff claimed would, when completed, interfere with his ancient lights. The defendants contended that a *quia timet* action in such circumstances would not lie; but Lawrence, J., held that it would, and he made a declaratory judgment to the effect that the defendants were not entitled to erect any buildings so as to cause a nuisance or illegal obstruction to the plaintiff's ancient windows and reserved leave to the plaintiff to apply for an injunction if necessary; but he ordered the defendants to pay only one-half of the plaintiffs' costs of the action.

SOLICITOR—CHARGING ORDER—PROPERTY RECOVERED OR PRESERVED—DISPUTE BETWEEN HUSBAND AND WIFE AS TO OWNERSHIP OF PROPERTY—APPOINTMENT OF RECEIVER—ABANDONMENT OF CLAIM BY PLAINTIFF—SOLICITORS' ACT, 1860 (23-24 VICT. C. 127), S. 28—(ONT. RULE 689).

Wingfield v. *Wingfield* (1919) 1 Ch. 462. This was an action brought by a wife against her husband claiming to be the owner of certain property in the wife's possession. On the application of the wife an interim receiver of the property was appointed. Sub-

sequently the plaintiff abandoned all claim to the property, and her solicitor then applied for a charging order on the property for the amount of his costs. Peterson, J., thought that the appointment of a receiver was a "preservation" of the property within the meaning of the Solicitors Act, 1860, s. 28 (Ont. Rule 689), but the Court of Appeal (Eady, M.R., and Scrutton, L.J., and Eve, J.) reversed his order, being of the opinion that the appointment of the receiver did not in any way "recover or preserve" the property. According to Scrutton, L.J., in order to entitle a solicitor to a charge it must appear that the property in question has been recovered or preserved through the exertions of the solicitor, and of which the real owner of the property takes the benefit; but the mere assertion of an unfounded claim against property, he thought, could give no such right.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. [47 D.L.R. 5.

Re COCHRAN'S TRUSTS, ROBINSON v. SIMPSON.

Evidence (§ IV A—393)—Proof of identity—Alleged ancient documents in proof of—Enlarged photographs—Evidence—Consideration of by court.

In order to establish the identity of a brother of the testator, who by his will directed his property to be divided under certain circumstances between the grandchildren of his brothers and sisters, certain claimants produced a large number of partially torn documents said to be recently discovered under the floor and between the walls of the family home of some of the claimants; copies of most of these writings were photographed on an enlarged scale by handwriting experts and put in evidence at the trial and these photographs were used on the appeal to the Supreme Court of Canada.

After examination of the original documents and the enlarged photographs and weighing the conflicting evidence the court held that the documents were not genuine, and found against these claimants.

G. F. Henderson, K.C., for appellants; *Rogers*, K.C., and *Burchall*, K.C., for respondents.

ANNOTATION FROM 47 D.L.R. p. 5.

Use of Photographs.—Examination of Testimony on the facts by Courts of Appeal.

It appears that the decision in this case finally depended in large measure upon the interpretation of certain fragmentary and partially illegible documents and upon the examination of this evidence itself by the judges who were to make final judgment in the case. The documents had been appropriately enlarged and arranged in convenient and accessible form so that the evidence, some of which was of a somewhat delicate character, was easily available and could be distinctly seen. Without this photographic assistance

it would have been difficult, if not practically impossible, to shew this evidence clearly to an appellate court under the usual conditions surrounding an argument.

The Judges in the Supreme Court in this case themselves examined and passed upon the physical evidence in its original form, and also in the form of enlarged photographs, and were thus able themselves to weigh the conflicting testimony of the witnesses on this particular subject. The Supreme Courts of numerous states of the United States, and some judges of Canada, refuse to consider questions of fact of this character in a case of conflict of testimony, and undoubtedly by this refusal may defeat the ends of justice.

A proper distinction in fact testimony thus is made, in the Supreme Court of Canada, between merely oral testimony and testimony relating to physical evidence like writings and photographs which are actually before the court.

It is obvious that with evidence of this kind before the court the usual objection to reviewing the facts, that the actual witnesses are not before the court, does not apply as it does with ordinary testimony, because the actual physical evidence itself is before the court. In some States of the United States, New York among others, courts of appeal in cases of this kind do consider the facts before them. This was done in a positive and definite manner in the case of *Townsend* v. *Perry* (1917), 177 Appel. Div. 415 (N.Y.), in which the Appellate Court set aside the verdict of a jury specifically on the facts. In this case the court says: ". . . a mere comparison of the signatures upon the instrument with the genuine signatures of Cyrènius C. Townsend, his wife, and of plaintiff's mother, clearly demonstrate, even to the layman, that the former are but clumsy forgeries."

Several State Supreme Courts of the United States have recently refused to pass upon, or even consider, the fact evidence even in cases in which the evidence was all before them; they would not make "a mere comparison." This question is often discussed in a manner that makes no distinction between merely oral testimony, the value of which depends solely upon the credibility of the witness, and technical testimony as to documents which illustrates and interprets physical evidence which is itself in visible form before the court. It would appear from the comments of some judges that they almost confessed to blindness and incompetence.

On this very point the Supreme Court of Kansas, U.S.A., in a recent case, *Baird* v. *Shaffer* (1917), 168 Pacific 836, discusses the question, emphasizing the modern view of the subject. Three witnesses testified that they had witnessed the will and the jury were convinced that the will was a forgery by the illustrated testimony of an expert witness. The proponents sought to reverse the verdict in this case on the question of weight of evidence, and the decision says:

"The testimony of attesting witnesses to a will may be overcome by any competent evidence . . . 2 Wigmore on Evidence, 886, 1514. Such evidence may be direct, or it may be circumstantial; and expert and opinion evidence is just as competent as any other evidence. Indeed, where the signature to a will is a forgery, and where the attesting witnesses have the hardihood to commit perjury, it is difficult to see how the bogus will can be overthrown except by expert and competent opinion evidence tending to shew that the pretended signature is not that of the testator, but spurious."

Province of Ontario

SUPREME COURT, APPELLATE DIVISION.

ABELL v. VILLAGE OF WOODBRIDGE AND COUNTY OF YORK.

Highways—Dedicated by owner—Private rights—Common and public—Easements.

Section 433 of the Ontario Municipal Act (1913, 3 & 4 Geo. V., c. 43, Ont.), provides that "the soil and freehold of every highway shall be vested in the corporation of the municipality or municipalities," and by s. 432, "all roads dedicated by the owner of the land to public use" are declared to "be common and public highways." The effect of this legislation and of the repeal of 3 Edw. VII. c. 19, which was concurrent with it, is to remove any easement or reservation to which the vesting of the highway was subject, and to vest absolutely and without qualification the soil and freehold in the municipal corporations.

Abell v. *Village of Woodbridge*, 37 D.L.R. 352, 39 O.L.R. 382, reversed.

O. L. Lewis, K.C., and *C. W. Plaxton*, for the County of York; *W. A. Skeans*, for the Village of Woodbridge and *J. H. Moss*, K.C., and *W. Lawr*, for plaintiff, respondent.

ANNOTATION FROM D.L.R. P. 513

Private rights in Highways antecedent to Dedication.

By A. D. ARMOUR.

Highways under English law were of two kinds, those in which the title to the soil remained in the Crown, subject to the public right of travel on the "King's Highway," and others, in which the ownership of the soil remained in some private owner who had, or was presumed to have, dedicated the land as a public highway. But this was never a dedication of all the soil, but a setting aside of the land as it were for a particular and paramount purpose. And it is to be observed that in neither of these cases did the public acquire anything more than a right to travel; subject to that right the ownership in the soil remained untouched. This being so, the owner of the soil could use it in any way he pleased, provided that he did not interfere with the public right. Such a freedom on the part of the owner could clearly result in the acquisition of private rights by others, either by grant or prescription, and many cases of private rights in highways, either antecedent to dedication, or subsequent and subject to the private right, are to be found in the reports.

To appreciate the effect of legislation and judicial decisions in this connection, it is necessary to understand clearly that at common law, the existence of a highway gives no ownership in the soil. The public have a mere right to travel, and the right cannot be exercised for any other purpose. Ownership presupposes the right to use the object of possession in any way pleasing to the owner, whereas in the case of a highway, the ownership in the soil of which remains in the owner of adjoining lands, a traveller cannot shoot game, flying or straying over the highway from the adjoining lands, without being guilty of a trespass. *Harrison* v. *Rutland*, [1893] 1 Q.B. 142. There being no ownership in the users of the highway, therefore it follows that they have a mere right which they may or may not exercise, as they see fit; something which has no physical existence, but is purely an abstract thing in its nature. The existence of this abstract right is not inconsistent with the ownership of the soil or freehold. It may also be subject to or co-existent with other rights acquired by private persons. In the case of highways, the title to which remained in the Crown, such rights could not have arisen except by grant. In the case of land dedicated by a private owner, many rights might have been acquired prior to dedication and might co-exist with the public right of travel. A private individual for instance may have his own right of way over the same land as that subject to the public right, and he need not justify his user of the land as one of the public, but may assert his private right. *Allen* v. *Ormond* (1806), 8 East 4, 103 E.R. 245. There may also be private rights co-existent with the public right of travel, both over and under the surface of the highway, as for instance, the right to maintain an arch and passageway over a highway, or a mining lease of lands under the highway. If these private rights are acquired prior to the acquisitions of the public right of travel, it is clear that under the English law, the dedication is subject to the antecedent rights. In the case of dedication, the owner cannot dedicate more than he has, and can only grant a right to use the land as a highway subject to any pre-existing rights. *R.* v. *Chorley* (1848), 12 Q.B. 515, 116 E.R. 960; *Duncan* v. *Louch* (1845), 6 Q.B. 904 at p. 915, 115 E.R. 341. That was supposed to be the law in this province until the recent case of *Abell* v. *Village of Woodbridge and County of York* (1917), 37 D.L.R. 352, 39 O.L.R. 382, reversed in the principal case, construing s. 433 of the Municipal Act of 1913 (3 & 4 Geo. V. c. 43). The law of this province governing ownership in the soil of highways before the passing of that Act was contained in 3 Edw. VII., c. 19, s. 601, which provided that "every public road, street, bridge or other highway in a city, township, town or village, except . . . shall be vested in the municipality, subject to any rights in the soil reserved by the person who laid out such road, street, bridge or highway." The effect of this enactment was stated in *Abell* v. *Village of Woodbridge*, 37 D.L.R. 352, and on appeal *ante* p. 513, to be that "not merely the surface but the freehold as well, subject to any rights reserved by the person who laid out the highway" was vested in the municipality. These words are not very clear, as the surface is part of the freehold, and it is presumed that what was meant was that the soil of the land over which the public right to travel existed, was vested, as well as the right to use the surface. The word "reserved" used in the Act is unsatisfactory, as a reservation can only be made of something

issuing out of the land. Giving the word its strict legal significance therefore, easements and licenses would not come within the Act. It seems to have been taken for granted, however, that the words "rights reserved" extended to easements, and licenses as well as *profits à prendre.** If this is so, the statute merely vested the soil of the highway in the municipality, and affirmed the common law rule as to rights acquired in the soil prior to dedication. That enactment has been substantially altered in form in the Ontario Municipal Act of 1913 (3 & 4 Geo. V., c. 43, s. 433), which provides that "the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of the Act"; and by s. 432, all roads dedicated by the owners of land to public use are declared to be common and public highways. It will be noticed that the affirmation of the common law rule saving antecedent rights has been omitted from this enactment. But the mere silence of an Act of Parliament is not sufficient to take away a common law right, very clear words are needed to have such an effect, and any interference with a common law right is strictly construed by the courts. The words "subject to any rights reserved by the person who laid out the highway" in the former Act, being only an affirmation of a part of the common law rule, it is submitted that their omission in the Act of 3 & 4 Geo. V. and the general repeal of the Act of 3 Edw. VII., do not destroy the common law right. The judgment in the *Abell* v. *Woodbridge* case states in part, however, that "there is no escape from the conclusion that the effect of this legislation and of the repeal of 3 Edw. VII., c. 19, which was concurrent with it, is to remove the qualification to which under that Act the vesting of highways was subject, and to vest absolutely and without qualification the soil and freehold of them in the municipal corporation." If this decision is correct, once land becomes a highway, it can be subject to no other rights than those of the municipality as owner in fee. If the statute acted by way of expropriation of the lands that would be a fair statement of the law. But it is submitted that the statute does not create the highway. The public right of travel is gained either by dedication or by prescription. In the former case, the owner cannot dedicate more than he has, and the public right must be subject to the rights already existing. In the case of prescription, a grant must be presumed, and the public cannot acquire a greater right than the owner could have granted. The acquisition of such a public right to travel is a necessary condition precedent before the statute can operate. It is only when that condition has been fulfilled that the Act vests the soil and freehold in the municipality. But the ownership of the soil and the right to travel are two different things, the one being in the municipality, and the other being a public right. Nothing in the statute enlarges the public right. Nor is there anything more inconsistent in the vesting taking place under the statute subject to existing rights than there was in the case of a dedication at common law. Moreover, the necessary condition precedent being the generosity, neglect or indifference of the owner of the land, the statute cannot operate as a confiscation of the property of another

*See annotation, 40 D.L.R. 144.

person. It was not intended to operate by way of expropriation, but merely to give all the necessary control over the soil of the highway to the municipality. If it destroys all the rights to which the soil may be subject, then where the land is subject to an easement, the statute operates upon the dominant tenement, which is no part of the highway; a result not probably intended by the legislature. The decision will have a far-reaching effect. Highways being laid out in a mineral bearing county, now that minerals pass to the grantee of the crown unless reserved, would make it impossible for many owners to grant an effective mining lease, for wherever there was a highway, the statute would erect a subterranean wall more effective to interfere with mining than the loss of the lode. He will also affect the law as to public highways closed by a municipality under s. 472 of the Municipal Act. The case of *Johnson* v. *Boyle* (1853), 11 U.C.Q.B. 101, decided that where a private right was claimed, and the defendant pleaded that the land over which the way was claimed had been a public highway, and had been closed by the municipality, the court allowed a demurrer to the plea on the ground that the antecedent right of way might still be extant, notwithstanding the facts averred in the plea. Since that decision a provision has been enacted in the Municipal Act, which appears in R.S.O., c. 192, s. 473, as follows:—

"A by-law shall not be passed for stopping up, altering or diverting any highway or part of a highway if the effect of the by-law will be to deprive any person of the means of ingress and egress to and from his land or place of residence over such highway or part of it, unless in addition to making compensation to such person, as provided by this Act, another convenient road or way of access to his land or place of residence is provided."

And by s. 492 of the Act, the owner of the land which abuts on the closed highway shall have the right to purchase the soil and freehold. If the *Abell* v *Woodbridge* decision is correct any private right of way over the closed highway would be extinguished, and the municipality would be bound to furnish another right of way. But as before pointed out, the owner of a private right of way over a highway need not justify his user as one of the public, *Allen* v. *Ormond, supra.* And Osler, J., in an *obiter dictum* in *Re Vashon & East Hawkesbury* (1879), 30 U.C.C.P. 194, 202, suggested that the private right survived the dedication of the highway and its closing by the municipality. If that is the law, when the owner of the private right purchased the closed highway, he would lose his right of way on the principle of merger, and the municipality would be bound to furnish another convenient way. But if he refused to purchase, or a stranger bought after his refusal, the municipality might refuse to provide another way on the ground that the private way still existed.

A. D. ARMOUR.

Bench and Bar.

Judicial Appointments.

His Honour Emerson Coatsworth, Junior Judge of the County Court of the County of York, to be Judge of that Court (July 11).

His Honor J. H. Denton, Third Junior Judge of the above Court, to be Junior Judge there of (July 11).

Hon. H. A. Robson, of the City of Winnipeg, K.C., and W. F. O'Connor, of the City of Ottawa, K.C. (appointed August 12, 1919), and Frederick A. Acland, of the City of Ottawa, Deputy Minister of Labour (appointed August 20, 1919), to be the Commissioners of the Board of Commerce of Canada.

His Honour Evan Hamilton McLean, Junior Judge of the County Court of the County of Renfrew, Ontario, to be Judge of the County Court of the County of Prince Edward, vice Judge Morrison, deceased (August 30).

The Prince of Wales and the Bar.—On Wednesday, the 2nd July, the Prince of Wales was called to the Bar by the Middle Temple and elected as Master of the Bench of that Inn, of which his grandfather, His late Majesty King Edward VII., was also a Bencher. The connection of the Royal House with the Inns of Court is an intimate one. His present Majesty is a Bencher of Lincoln's Inn, H.R.H. Prince Albert of the Inner Temple, and H.R.H. the Duke of Connaught of Gray's Inn.—*Law Times.*

Canadian Bar Association.

The programme for the Annual Meeting to be held in Winnipeg on August 26 to 29th, has been issued with commendable promptitude. The bill of fare is a full and interesting one, and the subjects to be discussed are very important.

A number of speakers from various parts of the Dominion, as well as from the United States, will be present, including the representative of the American Bar Association, Chief Justice Winslow, of Wisconsin, and others. Last but not least of those who are expected is Rt. Hon. Viscount Finlay, of Nairn, G.C.M.G., well and most favourably known to many of our Bar who have had cases before the Judicial Committee of the Privy Council.

Since then, as all know, Sir Robert Finlay became Lord Chancellor of England. Sir James Aikins is to be congratulated on securing his attendance.

The most important of the subjects to be discussed will be: Legal Education, Insurance, Company Law, Uniformity of Law, Bankruptcy, and Administration of Justice.

This gathering promises to be the most interesting meeting of the Association which has as yet been held. It is to be hoped that there will be a large attendance.

The volume (vol. 3) which contains the proceedings of the third annual meeting of the Canadian Bar Association, held at Montreal last September, has been received. It gives a full report of the proceedings of the meeting and other information of interest to the profession. The contents are suggestive of the valuable work done by various members of the Association during the past year. As it is now in the hands of the members it is unnecessary to give further particulars, except to say that it contains *in extenso* the reports of the various Committees.

Law Society of Alberta.

We have received the summary of the proceedings of the 23rd Convocation of this Society, held at Banff on July 2nd to 4th. The number of barristers and solicitors on the roll is 762, 19 having been added during the first half of the year 1919. The number of those who have taken out their annual certificates is 475. The total number in good standing is 534.

We notice that a resolution was passed in reference to the sittings of the Supreme Court of Canada elsewhere than at Ottawa, as follows: "That in the opinion of Convocation it is not in the interests of the administration of justice that the Supreme Court be made migratory."

There were full reports as to finances and matters connected with the library, etc.

New York State Bar Association.

The proceedings of the 42nd annual meeting of this Association, held at New York last January, make a bulky volume of nearly 900 pages. It contains the charter, constitution, by-laws, lists of the members, officers, Committees and Reports for last year. The public have little idea of the amount of work the profession does for them without fee or reward.

Flotsam and Jetsam.

The English vs. the American Constitution.

The Canada Law Journal referring to a recent statement in *Law Notes* that the American Government, however imperfect, is the best the world has ever seen, says: "We who belong to the British Empire demur to the statement that it is the best constitution the world has ever seen. That should not, however, be laid to the charge of those who formulated it; they did the best they could at the time. The British constitution is the result of development for a thousand years or so, and ought to be, as it is, the best." The remark thus demurred to was aimed, not at our British cousins, but at the nations whence come those who seek to repay our hospitality by destroying our institutions. Having borrowed our common law and many of our other institutions from Britain, we are certainly estopped to criticise harshly her Governmental system. What our contemporary forgets, however, is that it was after about nine hundred of those thousand years of British development that men, chiefly of British birth or ancestry, took all that they deemed good of British institutions, and used it as the basis of the American constitution. Many of the archaic fragments which then clung to the ancient institutions of the British Isles, England herself has since discarded, until at the present time but two radical differences exist, elective as compared to hereditary sovereignty and a written as compared to a traditional constitution. In respect to the first of these England has in effect adopted the American system by relegating the King to the position of a highly respected figurehead, and vesting the real executive power in the Premier. Even with this done, the possibility of a strong and evil King coming to the throne argues in favor of the American system. Our written constitution certainly gives a fixity to personal rights which no mere tradition can insure, and the fact that it has been eighteen times amended shews that it is not too inflexible. This leaves us free to boast of the absence of an established church and a hereditary nobility, relics of the past, whose right to present existence few thoughtful Englishmen will maintain. But over and above these differences and such friendly argument as may be indulged in with respect to them, the fact remains that between the two great governments of Anglo-Saxon origin there should exist no contention "save that noble contention, or rather emulation, of who best can serve and best agree" in the evolution and establishment of a system of just law.—*Law Notes.*

The Biggest Trust of All.

Whether trusts shall be prohibited or regulated is purely an economic question, and since there is to be a renewal of agitation on the subject it is to be hoped that its political animus will be enlightened with some small measure of economic knowledge. At the present time our anti-trust laws cannot command the respect of any thinking man, for the reason that they apply only to combinations of capital and not to combinations of labor. Between the two there is no possible distinction in principle. With respect to their effect, the combination of capital sometimes increases directly the price to the consumer, while the labor combination accomplishes the same result indirectly but surely by increasing the cost of production. As to the matter of methods, the capitalistic trust usually confers some benefit on the public by reductions while endeavoring to put a rival out of business. Organized labor knows no method of establishing a monopoly except by a stoppage of industry, often accompanied by destruction of property and assaults on individuals. There are two possible industrial theories, that of efficiency gained by the stress of unfettered competition and that of efficiency gained by combination under a single management. There is something to be said in favor of each. One thing, however, is certain, no sound industrial structure can be reared on the basis of capital organized according to one theory and labor organized according to another. The original argument in favor of the labor union was that the individual worker was at a disadvantage in dealing with an employing corporation and that collective bargaining was necessary to secure fair dealing. Now the shoe is on the other foot. The employer of a thousand men, in case of a dispute with them, is confronted with the threat that a million men in all parts of the United States will boycott his product unless he yields something that he does not think is justly due. The Government should either remove its inhibition from all industrial combinations in restraint of trade, or impose it equally on all combinations. For either course reasons may be adduced, but for the present policy of leaving unregulated only the combination which manifests the most brutal disregard of the rights of others nothing but political expediency can be pleaded.—*Law Notes.*

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THE PRINCE OF WALES AND THE BAR.

A most interesting event took place last month (August 27th) when His Royal Highness the Prince of Wales was welcomed by the Bar of Ontario at their Alma Mater, Osgoode Hall, Toronto.

The Prince was received by Dr. Hoskin, K.C., the Treasurer of the Law Society of Upper Canada, and others of the Benchers; and, with his staff, was conducted to the Convocation Room, where the Benchers and the invited guests were assembled and presented to His Royal Highness.

We give the rest of the proceedings as set forth in the Secretary's official minutes of the meeting as follows:—

"The meeting of Convocation took place on a dais erected at the easterly end of the Great Library on which were seated His Royal Highness and the Benchers present. The guests invited to be present and members of the profession occupied seats in the body of the Library.

His Royal Highness was presented for the degree of Barrister-at-law by Sir Allen Aylesworth in these words:—

"Mr. Treasurer, I have the honour to present His Royal Highness Edward Albert Christian George Andrew Patrick David, Prince of Wales, for the degree of Barrister-at-law."

The Treasurer addressed His Royal Highness as follows:—

"May it please Your Royal Highness—

"As Treasurer of the Law Society of Upper Canada—on behalf of the Society, and of the legal practitioners of this Province—I beg to express to you our grateful recognition of the signal honour you do us in coming to-day to this meeting of Convocation. We are met for the purpose of offering to Your Royal Highness our best welcome to Osgoode Hall, the seat of His Majesty's Superior Courts of Ontario, and of conferring upon you the Degree of

Barrister-at-law, a dignity which you have been graciously pleased to signify your willingness to accept.

"Since the foundation of this Society it has been our custom, before calling anyone to our Bar, to satisfy ourselves by careful examination, that such progress has been made in the acquisition of legal knowledge as will warrant admission to practice as a Counsel. But 'nice customs courtesy to great Kings,' and we know that Your Royal Highness has already been called to the Bar in England.

"In the name of Convocation I have the honour and pleasure of conferring upon you the degree of Barrister-at-Law.

"We shall ask the honour of the signature of Your Royal Highness to our Roll of Barristers, and it is with great satisfaction that we are able to lay before you for that purpose the parchment upon which, in this building, upon an occasion similar to the present Your Royal Grandfather, fifty-nine years ago, when he was Prince of Wales, graciously inscribed his name.

"Assuring you of the loyal remembrance in which his name is held among us, we beg to express the assurance that Your Royal Highness, like him, and like His Majesty your royal Father, may forever be enthroned in the hearts of his people.

"In addressing Your Royal Highness as Edward, Prince of Wales, we are reminded not only of Edward the first Prince of Wales, but as well of that other Prince—the second Prince of Wales—the great Plantagenet known to history as the Black Prince, of whose father, King Edward III., Your Royal Highness is a lineal descendant. We recall that Edward the Black Prince, when still young in years, was made first Duke of Cornwall—the first Dukedom created in England—and that this ancient title is to-day borne by Your Royal Highness in right of inheritance under the terms of the original charter by which it was first vested in Edward the Black Prince nearly six hundred years ago. The name of Edward the Black Prince has endured through the centuries as that of one of the most heroic of Britain's princes of renown. It is our hope that British subjects the wide world over may cherish in deep affection and loyal allegiance the name of Edward Prince of Wales who, like his great predecessor, has returned a soldier and

a veteran, from victorious war, and has, for Great Britain and the world, gallantly done his duty."

His Royal Highness was thereupon elected a Pencher of the Society on motion of the Hon. Featherston Osler, K.C., seconded by Mr. Alexander Bruce, K.C.

His Royal Highness replied to the Treasurer's address as follows:—

"Mr. Treasurer, I am deeply grateful to you and to the Benchers of the Law Society of Upper Canada for the honour that you have done me in conferring on me the degree of Barrister-at-Law, an honour which I very much appreciate. I thank you sincerely for your kind address and I assure you I am very proud to follow my late Grandfather in being called to the Bar of Upper Canada."

The Treasurer then called for three cheers for His Royal Highness, which were given with great heartiness by those assembled, who thereupon sang "For he's a Jolly Good Fellow."

His Royal Highness thereupon signed the Roll of Barristers, and Convocation then arose.

Afterwards His Royal Highness and staff and invited guests and the Benchers were entertained at luncheon in Convocation Hall.

After luncheon the Treasurer proposed a toast to the King, and the guests sang "God Save the King."

After the toast to the King, Dr. Hoskin, K.C., the Treasurer, proposed a toast to His Royal Highness in these words:—

"Gentlemen, I have another toast to propose."

"The members of our Bar who have had the honour and pleasure of taking part in the ceremonies of the day and of partaking of this luncheon, will not forget that they have been graciously honoured by the presence of His Royal Highness who has been pleased to be enrolled as a member of our Bar, a member of the Law Society of Upper Canada, a Society which in about two years will pass its century mark. I need scarcely say that what has transpired to-day will be duly preserved in our archives and that this occasion and the former one graced by that wise and great monarch, King Edward, will occupy a prominent place in the history of this Society, a history now being prepared under the authority of the Benchers.

"We sincerely thank His Royal Highness for the honour he has conferred upon us and the pleasure he has given us upon this occasion and trust that his royal progress through Canada will be attended with every success and with much pleasure and I am sure he will take back to the Homeland pleasing recollections of this—one of the greatest of His Majesty's Dominions.

"Perhaps His Royal Highness may become so enamoured of Canada that he may be induced to become, what shall I say—a royal settler, and if so, he may take up in our midst the practice of his profession, the law, and should he do so, I need scarcely say that as a counsel he will never be without a brief.

"Gentlemen, I have the honour of proposing the health and happiness to our youngest Barrister, our new Bencher, His Royal Highness the Prince of Wales."

His Royal Highness replied as follows:—

"Mr. Treasurer and Benchers of the Law Society of Upper Canada: You have already done me a great honour this morning, now you are paying me a further compliment in entertaining me at lunch, for which I am very grateful. It is a great pleasure to me to be able to come to Osgoode Hall to-day, the famous Inn which has produced so many great legal lights. I don't feel I came as a stranger to you because I am already a member, and not only that—a Bencher, of the Middle Temple.

"I cannot say I feel very proficient in my new position, but I think one of the things a barrister expects is to have a large practice in public speaking. I can assure you Canada is certainly trying to give me that. Next time I come I may become more proficient at it.

"I do want to express to you my admiration for the wonderful war service of this Inn. You had 300 barristers serving in the war and are still almost more wonderful, out of 330 students, you had 300 serving at the front. I do congratulate you most heartily on such a record.

"With you I mourn the loss of those 70 barristers and students who will never return. I offer to you my deep sympathy for the splendid men you have lost.

"The Treasurer said he hoped I might come and settle in

Canada. I am afraid I shall not be able to do that, but I will do the next best thing and come to Canada as often as I can. I again thank you for the honour you have done me, and the gentlemen for the kind manner in which they drank my health. Gentlemen, I ask you to drink to the health of the Treasurer of the Law Society of Upper Canada."

This was most heartily responded to; and so ended another historic event of great interest to the Bar of Canada.

THE BOARD OF COMMERCE.

In the good old days the Court of King's Bench was considered sufficient to deal with all matters requiring judicial investigation and determination; but, as business increased, provision had to be made to deal with not only increased business, but with various other matters of interest to the public. The enormous increase of mercantile transactions has produced in these days a system of specializing which has become common in almost every branch of industry, so that now it has been found necessary to have various special Courts to deal with special classes of business activities. A notable example of this was the addition to the Courts of the Dominion of the Board of Railway Commissioners. Now we have another Court, "The Board of Commerce of Canada." Although these are called Boards they are in effect Courts. The Dominion statutes of 1919 (9 & 10 Geo. V.) contain in chap. 37 the Act bringing into force the latter of these so called Boards—"a Court having an official seal which shall be judicially noticed."

The Judges are three Commissioners appointed by the Governor-General in Council who shall hold office during good behaviour, for a period of ten years. One of these is styled the Chief Commissioner. He must have been either a Judge of the Superior Court or a Barrister of 10 years' standing.

This Court or Board is charged with the judicial administration of "Combines and fair prices Act" which appear in the same volume as chap. 45. In respect of the matter contained in the last mentioned Act, the Board has power inquisitorial and mandatory of most exceptionally strong character. And in addition sec. 38 (1)

provides that any decision or order made by the Board under the Act may be made a rule, order or decree of the Exchequer Court, or of any Supreme Court in any Province of Canada and shall be enforced in like manner as any rule, order, or decree of such Court. And such rule, order or decree may be enforced at the will of the Board thus giving the Commissioners all necessary power without the necessity of any procedure of its own Court. The Board has full powers to call and examine witnesses and deal in a summary manner in respect to all matters within the large jurisdiction given to the Commissioners.

The need of such powers as thus given by the Act are admittedly most urgent at the present time, when the public is suffering from the high cost of living resulting not only from the conditions which have come into existence by reason of the great war but also by the greed of profiteers and the innumerable schemes and dodges of manufacturers, traders, agents, middlemen, etc., seeking to make money out of a heavily taxed and helpless community trying to make both ends meet, at a time when all necessaries of life have soared to a height beyond all reason and fairness. Needless to say that this Court and its activities are in the lime light to a degree unknown to any Court in the world's history. If results are produced the Board and its officers will deserve well of the country. The personnel of the Board is now complete, and consists of Hon. H. A. Robson, K.C., formerly a Superior Court Judge, as Chief Commissioner, and W. F. O'Connor, K.C., and James Murdock, Commissioners.

As to whether the advantages hoped for from this measure will fulfil expectations remains to be seen. That there is a necessity for it, and that it is a step in the right direction must be admitted. The frauds and deception connected with the high cost of living which abound at present are now being revealed in the evidence before the Board and may thereby be checked to some extent.

The war was of course the initial cause of the high prices, but farmers, manufacturers, wholesalers and retailers have taken advantage of the situation to embark on a voyage of misrepresentation as to the cost to them of the articles that they have for sale which is without excuse and without parallel in history.

Those who are familiar with legislation in England in former years, even as far back as the reign of King John, know that the effort now being made to reduce the high cost of living is not a new one. An interested and oppressed public wish it success.

CRIMINAL PRACTICE.

[COMMUNICATED.]

It is desirable that more attention should be paid to this branch of a lawyer's business. It is more important than it was, and there is a growing need as there is more diversity and difficulty in becoming proficient therein.

Without having any knowledge of the scope of the training in the Law School of Ontario as to criminal law or criminal practice, the writer is continually impressed on the one hand with the timidity of young as well as old members of the profession, who, having no hesitation in dealing with civil matters, are compelled to come into the criminal courts nervously aware that they are unprepared for their duty.

There is constant alteration to the Criminal Code and judgments on attempts to break through it. There are Orders-in-Council and extensions of Provincial statutes, which have so greatly widened crime and confused criminal practice; and, in consequence of the latter state of affairs, it is absolutely necessary for one in ordinary practice to become familiar with the practice in the Magistrate's or County Judge's Criminal Court and in Session Courts. If not he should honestly in the interest of his clients hand over to some experienced lawyers all his work in this particular line.

This simply arises from ignorance of the practice. It is therefore desirable that an effort should be made to give students a sufficient knowledge of the practice in the various Courts where clients may need their services.

For instance, the various lines of practice that are necessary between a summary conviction before a magistrate on which an appeal always lies, unless the statutes prohibit it; the trial of

indictable offences by the magistrate, with the consent of the accused, and the necessity, on an appeal in such case, of moving by way of stated case; the necessary steps to obtain a trial before the County Judge's Criminal Court, or the various methods of obtaining bail for a prisoner committed without additional trial, or the several steps which arise until a bill is found by the grand jury, and the case brought before the jury which has to give the verdict.

There have been a good many diverse and confusing judgments from time to time, dealing with the question of how long a man has a right to elect trial by a jury. This question is not entirely settled yet, having been confused by the Ontario Court judgment in *Rex* v. *Sovereen*, and the gradual qualifying of that case by subsequent cases, until the recent judgment in the Supreme Court which gave a man the right to elect at any time up to plea, notwithstanding a bill is found. Then in regard to law of evidence; such as the admission of the evidence of accomplices; of statements to the peace officer by parties when under arrest, and confessions; also as to the necessity of cautioning a man when arrested.

Perhaps it might be well if students were encouraged to spend some of their time in the criminal Courts and so widen their knowledge of the practice, and perhaps pay a visit to the morgue at night, which might be an enlightenment in regard to this branch of practice, as they may be forced to go there at any time in the interests of a client.

If a practitioner has no training in criminal practice he probably retains counsel who is familiar with it, or else seriously affects the interest of his client; and so he loses fees which would otherwise legitimately go into his own pocket.

The experience of the writer of the above communication is so extensive that his remarks are entitled to serious consideration. With regard to the training of students in the Law School, it may be said that the subject of criminal practice is fairly well covered in the lectures, with the exception of summary conviction (Part XV). This branch may not be considered of major importance, and

involves consideration of a large number of unimportant statutes. The suggestion that students should attend criminal sittings to see the practical working out of this phase of the subject is a good one, and we are told has already been advised by one of the lecturers. Whilst it is true that criminal business is in the hands of a very few men in large cities, it may partly be accounted for by the inexperience and ignorance referred to by our correspondent, and this is what he thinks ought to be remedied. We have no doubt that the excellent head of the Law School will see that all that can be done in the premises will be done. Last year he had one of the Crown Attorneys give some lectures to Third Year students on Police Court practice.

DOMINION STATUTES, 1919.

This volume has been received and it is a bulky one, more than usually important.

The first 148 pages are devoted to the following Imperial Acts: (1) An Act amending the law relating to Naval Prize of War; (2) An Act to amend the British Nationality of State and Aliens Act, 1914; (3) An Act to make provision for determining the date of the termination of the present war; (4) An Act to amend the Criminal Code. Various Orders-in-Council, Imperial and Canadian, are also given.

Then follow the Public Acts of the Dominion Parliament, which are numerous. Those of most importance to the profession are: (1) An amendment to the Interpretation Act, defining terms, etc.; (2) The Bankruptcy Act; (3) An Act constituting the Board of Commerce; (4) The Naturalization Act; (5) The Pension Act; (6) The Combines and Fair Prices Act; (7) An Act to amend the income war tax of 1917; (8) An Act to amend the Insurance Act of 1917; (9) An Act to amend the Judges' Act; (10) An Act amending and consolidating the Railway Act.

The Bankruptcy Act was the result largely of the helpful labours of the Canadian Bar Association. Its genesis is referred to in our report of the proceedings at its last annual meeting (see page 292, *post.*) This long expected legislation has come

at last, but the Act will not come into force until a day to be named by proclamation. There is plenty of reading for the profession provided by this Act.

We speak in another place as to the formation of the Board of Commerce for Canada, to which we refer our readers. Amendments to the Criminal Code are somewhat numerous, the principal one dealing with unlawful associations, seditious books, carrying weapons, etc., with a number of other sections, *quae nunc prescribere longum est.* The Act to amend the Judge's Act is of special interest to the Judges as it deals with their salaries, in which, properly enough, they have taken much interest during the past year. If they took as much interest in increasing the tariff of fees of solicitors, the latter might be more sympathetic: ("a nod is as good as a wink.") We trust there will be more said about this hereafter. The Consolidated Railway Act gives all the legislation on that subject and also gives plenty of reading, containing as it does 461 pages.

REDEMPTION BY TENANTS IN COMMON.

The decision in *Adams* v. *Keers*, 16 O.W.N. 347, appears to be a departure from the well-settled rule that tenants in common who have mortgaged their estate are not entitled severally to redeem their respective shares, but must redeem the whole: see *Faulds* v. *Harper*, 2 Ont. R. 405, *per* Proudfoot, J., at p. 411. The circumstances of the case were a little peculiar. The action was for foreclosure of a mortgage made by three persons; the Toronto Railway was made a party as a subsequent encumbrancer by virtue of an execution against one of the three mortgagors. The railway company redeemed the plaintiff's mortgage. It then became a question in what way redemption of the railway company should be directed. The method adopted by the Master is not stated in the note of the case; but whatever it was, his report was set aside, and he was directed to ascertain the respective shares of the several mortgagors and allow each to redeem his respective share; but as to the one whose interest was subject to the railway's execution, the amount of such execution

was to be added to the amount payable by h m for redemption of his share. It might therefore happen that the railway would be redeemed only as to part of the plaintiff's mortgage paid by it, which does not appear to be right, because, as to that mortgage, the railway stood in the plaintiff's shoes and had the same right as he had, and, as to him, each of the mortgagors was bound to redeem the whole and not merely his particular share, and to allow each mortgagor to redeem his particular share is not, we think, according to the usual course of the Court. We are inclined to think that the Master's duty was to ascertain what the share was of the defendant whose interest was bound by the execution, and to appoint one day for all defendants to redeem the railway as to the amount paid the plaintiff, w th subsequent interest and costs, and for the defendant bound by the execut on to pay in addition the amount due thereon—and according as redemption was made, the railway would convey: see *Pearce* v. *Morris*, L.R 5, ch. 227. If only the amount due in respect of the plaintiff's mortgage were paid, the railway would convey subject to its rights in the undivided share of their execution debtor as against whom they would be entitled to a final order of foreclosure The working out of their rights against their execution debtor might ultimately necessitate partition proceedings.

THE CANADIAN BAR ASSOCIATION.

Fourth Annual Meeting.

The fourth annual meeting of this Association was held at Winnipeg, August 27th to 29th. Its President, Sir James Aikins, K.C., Lieutenant-Governor of Manitoba, presided. It was without question the best and most interesting meeting of this Association that has as yet taken place, and prophetic we trust of greater advance in its usefulness in the future.

The existence of the Association has been somewhat of a struggle since its commencement, owing to the fact that members of the profession are so widely scattered over the immense territory bounded on the East by the Atlantic and on the West by the

Pacific Ocean. A realization of this may have damped the ardour of many who might have been expected to have taken a more active part in the activities of the Association.

The attendance of the profession at this meeting was most satisfactory. In addition to the many eminent names which appear hereafter there were about 330 members of the Dominion Bar present, the representation being from all the Provinces. Naturally there was a large attendance of the Western men, but New Brunswick had ten, with one from the far East, Prince Edward Island.

The Association, through its committees, has been doing excellent practical work. For instance, in its effort to secure unification of the law relating to bankruptcy, and also in reference to fire insurance conditions, sales of goods, etc. At the first annual meeting of the Association in 1915, it took up the question of insolvency. Interest was continued in this by the Montreal Committee, until the matter was pressed in the House of Commons by Mr. Jacobs, K.C., who introduced a bill. It was not passed in the form in which he introduced it, but it was taken up with the Credit Men's Association; and their legal representative was present at the meeting in Montreal and submitted their proposed bill to the Association. At the last meeting of the Council in Toronto in April, Mr. Eugene Lafleur, K.C., and Mr. S. W. Jacobs, K.C., were asked on behalf of the Association to give their assistance in advising in reference to some of the provisions of the Bill, which they most cordially did. This revised Bill is now in substance chap. 36 of the Dominion Statutes 1919 (9 & 10 Geo. V.).

While the Association continues its committee on uniformity of law, it suggested the appointment of Provincial Commissioners to deal with the subject. Most of the Provinces have concurred and appointed, either under special legislation or general executive authority, representative lawyers to meet in conference. The first working conference was held in Winnipeg on the day before the annual meeting of the Bar Association, and continued its sessions at intervals during the meeting. Mr. J. D. Falconbridge is the Recording Secretary of the body and has been giving the subject earnest attention.

Reports were presented by the Committees dealing with the various subjects. These were discussed with keen interest and they were as follows:—

Report on Legal Ethics presented by Angus MacMurchy, K.C., of Toronto. This was accompanied by a very able paper by Mr. Justice Riddell of the Ontario Bench. These appear in extenso on a subsequent page.

The report of the Committee on Legal Education was presented by Dr. R. W. Lee, Dean of the Faculty of Law in McGill University. This report is also given in full on another page.

The report of the Committee on the Uniformity of Law was in charge of W. H. Trueman, K.C., of Winnipeg. This important subject is being fully dealt with by the Provincial Commissioners, who are endeavouring to put into practical form the suggestions of the Associations as expressed through the Committee and in the discussion which followed the reading of the report. We shall refer to this subject again when the Commissioners have more information to impart.

The Committee which had to deal with the Administration of Justice was in charge of W. J. McWhinney, K.C., of Toronto. After a full discussion some changes were made and the report was adopted in the form hereafter set forth.

Several interesting and important addresses were delivered. The opening address was by Sir James Aikins, President of the Association, and two by Viscount Finlay, Ex-Lord Chancellor of England; another was by Hon. J. B. Winslow, Chief Justice of Wisconsin, and another by Col. Geoffrey Lawrence of the English Bar. The addresses of Lord Finlay were of special interest dealing with many important subjects discussed by one whose views and opinions are valuable both for present interest and for future reference. We shall give them to our readers hereafter as far as space permits.

At the close of the business session Chief Justice Harvey of Alberta, seconded by W. E. Bentley, K.C., of Prince Edward Island, moved a resolution of appreciation of the invaluable services of Sir James Aikins in connection with the Association since its organization in March, 1914. This was received and carried with great enthusiasm.

The annual dinner took place on the evening of the last day followed by brief speeches by Viscount Finlay, Chief Justice Winslow, Hon. W. F. A. Turgeon, Attorney-General of Saskatchewan, Mr. Justice Mignault of the Supreme Court of Canada, Mr. Lafleur, K.C., and Isaac Campbell, K.C., of Winnipeg, Vice-President of the Association for Manitoba. Those present displayed their appreciation of the work and personality of Mr. Campbell by a memorable ovation which must have been very gratifying to this beloved leader of the Western Bar.

The list of officers for the ensuing year is given in another place (*post* p. 317)

REPORT OF THE COMMITTEE ON LEGAL ETHICS.

At the Annual Meeting of the American Bar Association in 1905 attention was called by the President, Henry St. George Tucker, of Virginia, to a striking statement by President Theodore Roosevelt, "that many of the most influential and most highly remunerated members of the Bar, in every centre of wealth, made it their special task to work out bold and ingenious schemes by which their very wealthy clients, individual or corporate, can evade the laws which are made to regulate, in the interest of the public, the use of great wealth . . . that such a lawyer is doing all that in him lies to encourage the growth in this country of a spirit of dumb anger against all laws and a disbelief in their efficiency. Such a spirit may breed the demand that laws shall be made even more drastic against the rich, or else it may manifest itself in hostility to all laws."

In his address Mr. Tucker suggested the adoption in all Schools of Law of an enlarged and comprehensive course in the subject of legal ethics to be taught by men of lofty ideals which they try to live up to and not merely talk of.

Thereupon a committee of five was appointed, of which Mr. Tucker was chairman, to report at the next meeting upon the advisability and practicability of the adoption of a code of professional ethics by the Association.

At the annual meeting in 1906 the Committee reported that the adoption of such a code was not only advisable but under existing conditions of very great importance, that unless the public had confidence in the integrity of the administration of justice there could be no lasting permanence to republican institutions, that with the influx of increasing numbers who seek admission to the profession mainly for its emoluments, have come new and changed conditions. Never having realized or grasped that indefinite ethical something which is the soul and spirit of law and justice these men not only lower the morale within the profession but debase our high calling in the eyes of the public.

It was considered that the adoption of a code by the American Bar Association would tend to develop uniformity of practice between the various States.

Another reason given for the adoption of a code was that many men depart from honourable and accepted standards of practice early in their legal careers as the result of ignorance.

In 1907 the same Committee presented a report recommending that Sharwood's well-known and instructive essay on Professional Ethics, first published in 1854, should be reprinted and issued in a volume supplementary to the Annual Report. The Committee was directed to have the proposed canon of professional ethics prepared by 1st May, 1908, to transmit a copy to each member and to the Committees, of the respective State Bar Associations for criticism and suggestions, and that the final report should be ready for submission at the 1908 meeting, when it was adopted in its present form.

The Law Society of Upper Canada considered a code of professional ethics several years ago at the suggestion of the late Mr. Justice Rose, with the approval of Dr. Hoyles, Principal for over twenty years of the Law School at Osgoode Hall. The matter was considered by the Legal Education Committee, of the Benchers, but was not favourably entertained at that time. The late Mr. Christopher Robinson, K.C., was one of the principal opponents. He took the position that legal ethics could not be taught in that way, that it was merely a matter of mental and moral education, and not one that could be reached by the adoption

of formal rules, and the proposal was abandoned. For a number of years, however, lectures on professional ethics have been given to the students in attendance at the Law Schools at Osgoode Hall, by Mr. Justice Riddell, Mr. Hamilton Cassels, K.C., Mr. Edwin Bell, Secretary of the Law Society, and others. The Principal, Dr. Hoyles, and lecturers on the staff of the Law Schools also endeavour to impress on the students the broad principles of legal morality. Whether or not this was the proper conclusion at the time, Dr. Hoyles still remains of opinion that it would be a very desirable thing to have something in the way of definite principles formulated for the guidance of students of the law, without going too much into details, where the difficulties suggested by some of the opponents of a code might be likely to arise. Dr. Hoyles is of opinion that something is needed to impress upon practitioners the viewpoint of the profession which is set out by Mr. Elihu Root, in an address delivered before the American Bar Association in 1916. He speaks of the "true spirit of the profession" as being one "not of mere controversy or mere gain, of mere individual success. To the student of the law there come from all the glorious history of the profession of advocacy great traditions and ethical ideals and lofty conceptions of the honour and dignity of the profession, of courage and loyalty for the maintenance of the law and the liberty that it guards. It is to a Bar inspired by these traditions, imbued with this spirit, not commercialized, not playing a sordid game, not cunning and subtle and technical, or seeking unfair advantage—a Bar jealous of the honour of the profession and proud of its high calling for the maintenance of justice—that we must look for the effective administration of the law."

In view of the changed and changing conditions of this country, and the large number of students now admitted to practice, many of whom come from various countries whose traditions and surroundings have not been similar to those of our own and the Motherland, the time may be considered as having arrived when it is necessary to reduce to writing for the information of the members of the Bar and the guidance of our law students some of the most important general principles governing the conduct of

the profession towards the Bench, the public, and their clients, setting forth among other things the ideals and standards of the profession, its honour, dignity and traditions, but without going too much into particulars as the American Bar Association appears to have done, and without being deemed exhaustive of the subject. This statement should not go into minute details or essay to accomplish the impossible task of providing for changing circumstances which are bound to arise in future.

The Saskatchewan Bar Association and the Benchers of Alberta have both taken steps towards the preparation of a code, and a draft has been submitted by Dr. James Muir, of Calgary, to the Law Society of Alberta.

Your Committee would recommend that a select Committee be appointed by the President of the Association to prepare such a statement of the principles of legal ethics as has been suggested in this report, using amongst other data the code of the American Bar Association supplemented by the draft code prepared for the Law Society of Alberta, as well as a similar code prepared some years ago and adopted by the Ontario Bar Association, and that such Committee make its report at the next meeting of the Association.

A CODE OF LEGAL ETHICS.

Paper prepared by Hon. Mr. Justice Riddell, at the request of the Association to accompany the foregoing Report.

(After certain preliminary remarks.)

In my own Province for nearly a century and a quarter, jurisdiction over the Bar has been exercised by the Law Society of Upper Canada, organized in 1797 under the authority of the statute of that year of the young Province of Upper Canada—and since that time no advocate has been heard by the Courts unless and until he has been called to the Bar by that Society. Full jurisdiction over the attorney or solicitor the Law Society does not possess: it prescribes the curriculum, it educates, it examines, it certifies the fitness to be admitted as a solicitor of the candidate, but there its authority and duty end—and

even that jurisdiction was not original, but was given by the statute of 1858. But in our system it has always been and is now the case that all but a very small percentage of solicitors are barristers, and of barristers are solicitors.

The first chapter of the first statute of the Province of Upper Canada (32 Geo. III., c. 1), introduced the laws of England as the rule for decision in all matters of property and civil rights, while the criminal laws of England formally prescribed for the conquered colony by the Royal Proclamation of 1763 had been left untouched by the Quebec Act of 1774 (14 Geo. III., c. 85). Accordingly, when the profession in the Province was organized the law, civil and criminal, in force was the existing law of England (with a few trifling exceptions).

The Act of 1797 was intended to place the profession of law on much the same basis as in England, but the circumstances of the colony did not allow of this being fully accomplished. One attempt to introduce the English system of prohibiting the same person to be both barrister and solicitor was defeated by the Benchers themselves, a second by the Judges, and the third and last by the Legislature; and the system is too firmly established to be now shaken.

It may, therefore, be said with reasonable accuracy that the Law Society has jurisdiction over the profession at large.

The Bar and the Bench of our Province have followed the traditions of England, recognizing that England is their intellectual ancestor. We in Ontario are inclined to claim, perhaps to make rather a boast, that the Bar and Bench of the Western Provinces have been largely recruited from our Province and share our traditions. Where that is not the case, the traditions of the profession in England are equally potent as with us.

The Bar and Bench of the Maritime Provinces have their own traditions, but these, like ours, are based on England.

Our illustrious sister, Quebec, stands in a different position: her criminal law indeed is English in its origin, but her civil law is based not upon the Common Law of England, but upon the Civil Law of Rome. Yet most of her rules, customs and practices are the same as ours.

Remembering the history of our profession, I thought it wise to consult the Chiefs of Bench and Bar in England; and as Ireland has much the same system and traditions, I at the same time consulted those in that land. Scotland has a law based on the Civil Law as has Quebec, and I asked the opinion of some of the leaders in Scotland. Without a single exception, all who replied were opposed to a written Code of Ethics.

The opinion of the profession in the British Isles is most persuasive, but, of course, it should not, it cannot be considered conclusive upon us, however closely we are affiliated, however much we owe to the Mother Country, however near the practice of the Courts. Circumstances in this Dominion, as in other Dominions, may make a difference advisable if not imperative in system.

As against the practice in the Old Land we may be inclined to consider that in the various States of the American Union—the usages of trade and of society, the "genius of the people" are much more near our own in many of these States than in England; while politically we are intensely British (and have no desire to change our position), in the general conduct of business, and of intercourse, in form and customs we are inclined rather to the American. Most of the Bar Associations of the various States of the Union have their formal Codes of Ethics as has the general Society—the American Bar Association. I am favoured in being an honorary member of several of these Bar Associations, and have enjoyed the privilege of frequent and somewhat close association with their members; and I have found an almost universal approval of the written code. Although in most cases other reasons were alleged for that approval, I am wholly of the opinion that in many instances that view is due in no slight degree to the fact that the United States and the separate States have all a written Constitution. The mind of the American lawyer naturally and instinctively inclines to written formulation of all precepts, all rules, all principles.

The difference in the connotation of the words "Constitutional" and "Unconstitutional" in the American usage and our own will illustrate my meaning. In the United States the

"Constitution" is a written document of so many words and letters, with us the Constitution is the indefinite and indefinitely formulated principles upon which a British people should be governed—what is "Constitutional" and what is "Unconstitutional" in the United States is for the Court to decide on legal principles and methods by an examination of the formal document to be known and read of all men—in Canada it is for Parliament, or in the last resort the electorate, by the consideration of what is for the benefit of the people. In the United States anything transgressing the written document is illegal however wise it may be. With us to say a proceeding is "Unconstitutional" is to say it is legal, however unwise, or even oppressive, it may be. Whether my impression of the cause of the formulation of a Code of Ethics in the United States is well founded or not, it is manifest that the practice in that land is not binding upon us, like as the two countries are in most particulars.

In the first place, it may be assumed that it is not proposed to lay down a Code, disobedience to which would result in disbarment temporarily or otherwise. Our Law Society of Upper Canada has ample power to disbar in a proper case, but the power has been exercised only in the case of crime whether after conviction or otherwise. So far as I know it has never been suggested that a Code of Rules should be laid down to govern the Discipline Committee or Convocation in their duties in that regard, and I can see infinite difficulties in the way of such codification.

Not to dwell upon that phase, however, let us consider the real proposition, which is to lay down a Code the breach of which will lead to the disapproval of professional brethren, to exclusion from association and fellowship, to ostracism by respectable members of the Bar. If it were proposed to make the Code, a Penal Code violation of which would render the offender liable to disbarment, legislation would be necessary, and many considerations would arise which may now be passed over—considerations which to my mind would be fatal to the proposition.

What of a Code without such consequences? of a Code

intended to govern the conduct of the practitioner, but the violation of which would involve only social punishment? or a Code intended simply as advice as to conduct?

It seems to me much like drawing up a Code of Etiquette to make a gentleman.

When I used to deliver lectures to the students of the Osgoode Hall Law School on Legal Ethics, I devoted most of my time and efforts to shewing that the profession of law is a liberal as well as a learned profession, that there is and can be nothing in the practice of law inconsistent with the highest type of scholar, gentleman and Christian. With that as a text, all else follows—the lawyer, a gentleman, will act as such, he will treat all, whether professional brethren or laymen, as he would be treated in like case—that, it seems to me, is the whole of the law and the prophets. I would have in every law school two or three lectures in each year on legal ethics in that sense—lectures either by the president or (preferably by) some one in active and extensive practice, devoted to inculcating in the mind of the students the all-important fact that the lawyer who is worthy of his profession is not a mere money-making machine, but a gentleman respecting himself and his fellow men—he may and should make all the money he honestly and honourably can, but only so much and how as he honestly and honourably can. Is there any more need for a Code for lawyers than for members of a club? Both are expected to act as gentlemen, but no one would think of codifying the duties of club members. In that view a Code is superfluous, unnecessary.

There are, however, positive objections to a Code which states any but the most indefinite generalities. Any Code which entered into particulars would in my view do more harm than good—and for two reasons: First, when a Code of Rules has been formulated it is most natural, almost inevitable, indeed, for its provisions to be considered exhaustive; whatever is for- is forbidden is wrong, and in most minds the old logical fallacy of the "undistributed middle" is not avoided, but it is considered that what is not forbidden is not wrong. When one is charged with wrongdoing, and told that he must act in a particular way,

his defiance is "on what compulsion must I?" "It is not so written in the Code."

It is the natural and inevitable consequence of any written code to divide sharply what is forbidden from what is not—and what is not forbidden too often is considered to be allowed. Anyone who is accustomed to refer to a written Code for the rule to direct his conduct will be apt to believe that it is complete, and will generally give himself the benefit of any doubt or omission.

Again, unless I am quite in error, any attempts to particularize would be dangerous. Let me take two examples.

A well-known compilation by a Bar Association of the highest rank, both as to members and otherwise, has it: "His," *i.e.*, the lawyer's, "appearance in Court should be deemed equivalent to an assertion on his honour that in his opinion his client's case is one proper for judical determination." That I make bold to deny—while the lawyer may not bring into Court a dishonest claim, or set up a dishonest defence (because he is an honest man, and the law compels no man to dishonesty), the client is entitled to the services of his lawyer to enforce any claim or defence which is not dishonest; the client is entitled to the full and candid opinion of his lawyer, but when that is given, he is entitled to have his case put to the Court whatever may be the lawyer's opinion on the law. Neither Court nor client is at all concerned with the opinion of counsel—the client demands, the Court enforces the law, as it is found to be—that is the duty of the Court, the right of the client. Counsel makes no assertion by implication of his own opinion when he argues the case of his client; and it would be unjust and improper to consider that counsel when arguing is representing that there was in his opinion doubt as to the law.

[The Rule as to Champerty is discussed and not wholly agreed in as an ethical is anything but a legal rule.]

* * *

I know it will be answered *interest reipublicae ut sit finis litium*. But that does not mean that it would be for the advantage of people at large, that there should be no law suits—so long

as injustice prevails a lawsuit to end an injustice is infinitely better—and, I add, infinitely more in harmony with the genius of our people—than passive submission to the injustice. The maxim means that it is for the interest of the people that a lawsuit when started should be carried to a conclusion with all due expedition—and if it means anything more, it is that it will be a good thing for the people when wrong shall cease, and there will be no further need for litigation.

The real difference is that one contract is forbidden by law and the other is not.

So long and in such places as this rule is law, it is proper to say, as one Code does, "the lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting"—but that there is a general ethical rule I deny.

Contingent or conditional fees are in the same category.

These are some of the reasons which, to my mind, make it inadvisable to formulate a Code of Ethics.

My opinion in short is that a Code of Legal Ethics, if sufficiently general, is unnecessary—if specific is dangerous.

William Renwick Riddell.

REPORT OF THE COMMITTEE ON LEGAL EDUCATION.

In connection with this important subject your Committee has taken into consideration the existing law and practice in the several Provinces, and submits a scheme which it trusts may be found suitable for general adoption. Its features are:

(1) To adhere in the main to the existing system, which is essentially the same throughout Canada; (2) To remove unessential differences; (3) To leave to the several Provinces a wide discretion in matters of detail.

The subject is dealt with under the four heads of:

(1) Admission to Study; (2) Period and Course of Study; (3) Transfer of Students; (4) Admission to Practice.

(1) *Admission to Study.*—Your Committee recommends that every candidate for admission to study be required to have

passed an examination at least equivalent to the standard attained by a student at the end of the first year of the course leading to the degree of B.A. at an approved University. No student to be admitted to study who has not attained the full age of 18 years.

(2) *Period and Course of Study.*—Your Committee recommends that the course of study shall consist in attendance at the office of a practising barrister, or under indentures at the office of a practising solicitor, for a period of five years, provided that attendance as aforesaid for a period of three years shall be sufficient in the case of students who, at the time of their admission to study, are graduates of an approved University; provided further that in Provinces in which an approved law school exists, the obligation of office attendance shall be suspended during the period of the year in which a student is duly following a course of study at such law school. An approved University and an approved Law School mean respectively a University and a Law School, or the Law Faculty in a University, approved for the purpose by the Council of the Canadian Bar Association.

(3) *Transfer of Students.*—In order to provide for the case of students who may desire to continue their course of study in a Province other than that in which they have been admitted to study, your Committee recommends that, in computing the period of study in any Province, credit shall be given for previous office and law school attendance in any other Province or Provinces, if the requirements in respect thereof are substantially equivalent to the requirements in respect of office and law school attendance in the Province in which any such student desires to continue his course of study.

(4) *Admission to Practice.*—Your Committee recommends that the examination to be passed by students before admission to practice remain as heretofore under the direction and control of the constituted authority in each Province. It is suggested however, that the provincial authorities be invited to co-operate with this Association with a view to securing a reasonable degree of uniformity, and effecting other improvements in the examinations and in the prescribed courses of study.

Your Committee further recommends that a Sub-Committee be appointed to prepare and submit a standard curriculum for adoption by the various Law Schools in the Common Law Provinces and that in such curriculum increased attention should be paid to the training of the students in legel ethics and public speaking. Your Committee further recommends that a Sub-Committee be appointed to consider and bring in a report on the method of teaching in law schools.

COMMENT ON THE ABOVE REPORT BY DR. R. W. LEE, CHAIRMAN OF THE COMMITTEE.

This report is a re-modelled version of the report of the late Committee on Legal Education and Ethics which was presented at the Montreal meeting. It is hoped that it may prove generally acceptable. In addition to the features referred to in the body of the report, the following points may be referred to:—

(1) *Limitation of the report to the Common Law Provinces.*—This was introduced at the instance of the Montreal members of the Committee, who felt that they were not sufficiently representative of the various elements in the Province, and therefore preferred to refrain from making any recommendation.

(2) *Admission to Study.*—The Committee adheres to the idea that a student should not be admitted before he reaches the age of 18. It is objected that a boy may leave High School at 16; what is he to do in the meantime? The answer is obvious. Put in his time in the Arts Faculty of a university or in some remunerative employment. He is too young to study law.

(3) *Period and Course of Study.*—The Committee accepts the principle of office attendance during the whole course, but with the qualification that students need not go to the office while actually attending the Law School. In accordance with existing practice the period of study is reduced in favour of graduates.

(4) *Transfer of Students.*—The principle of free transfer is admitted. The Committee recommends that credit be given in any Province for previous extra-provincial studies, but does not determine the amount of credit. This is left to the discretion of the Province to which the student seeks to transfer.

(5) *Uniformity of Curriculum.*—This subject should be taken in hand without delay by a small Sub-Committee.

REPORT OF COMMITTEE ON ADMINISTRATION OF JUSTICE.

1. The Judiciary.

The Committee begs to report that since the adoption of its report as amended at the Annual Meeting in 1918, action has been taken by the Dominion respecting the salaries of Judges of County and District Courts. The amount aimed at in that report was $6,000 and the result of the legislation referred to is a straight salary of $4,000. It is illogical that with the present high cost of living and the wave of increased remuneration for salaries in commercial and other lines that there should have been any hesitation to give Judges the minimum asked for—$6,000. Your Committee regrets to have to report that the general principle that the salaries of Judges of Supreme Courts should be increased has not been recognized and that with the exception of an attempt at partial adjustment as between trial and appellate Judges no action has been taken. It is respectfully suggested that the Association be asked to reaffirm the salaries set forth in clause 9 of the report submitted at the Annual Meeting of 1918, except that it is recommended that there should be no distinction between the Judges of the Appellate Courts and those of the Superior Court and that the minimum for each of such Judges be $10,000.00, and that all duties assigned to the Judiciary either by Dominion or Provincial Governments be performed without fees, and that the practice of appointing the Judges as commissioners and arbitrators be discontinued. Your Committee further regrets that the established principle of leaving Judges' salaries exempt from taxation is being infringed upon, and recommends that a communication be addressed to the Minister of Justice that the statutes be amended by striking out section 13 of the 1919 amendment to the Judges' Act and leaving subsection 3 of section 27 of chapter 138, R.S.C., 1906, as it originally stood. Your Committee feel that the proposed legislation requiring Judges to make a statutory declaration before receiving their salaries is a reflection upon the Bench and your Committee recommends that a protest be sent to the Honourable the Minister of Justice.

2. Tariffs and Fees for Services in the Profession Generally.

While certain of the Provinces have recognized the necessity of an increased tariff of fees and have effected increases to the extent

of about 50%, your Committee regrets that in other Provinces the authorities have not yet done so. Your Committee would recommend that this Association give this matter its fullest support in Provinces where an adequate increase has not been made.

3. Marriage Contracts and Divorce.

There has been considerable controversy on the subject of transferring to the jurisdiction in divorce and marriage contracts from the Dominion Parliament to the Provincial Courts and W. F. Nickle, Esq., K.C., M.P., introduced legislation with that object in view—a copy of which is attached to this report—but your Committee deals with the question of principle and strongly advocates that paragraph 7 of the 1918 Report be reaffirmed and that the Association pledge itself to support any legislation making uniform the grounds on which marriages can be annulled or contracting parties divorced and transferring jurisdiction in such matters to the Superior Courts of each Province, and excepting operation of the Act from the Province of Quebec until that Province, by an Act, puts into force the Dominion legislation suggested.

Your Committee further recommends that a Committee be appointed to watch and deal with any legislation that may be introduced in the Dominion House on the question of Divorce. (It was moved and carried that the Cmmittee on the Administration of Justice be the committee to carry out the above work.)

4. Reports.

Your Committee recommends that the President be requested to appoint a special Committee of this Association to correspond with the respective Law Societies and Provincial Associations in Canada, to consider the matter of reporting and the practicability of the reporting of cases for all Canada, so as to prevent duplicating and overlapping of Reports and to reduce the expense thereof, and that the Committee report its conclusions and recommendations to the Council of the Association, the Council to bring in a report before the next annual meeting of this Association.

Your Committee is strongly of the opinion that the present

system of Reports is highly unsatisfactory and creates undue burden on the profession.

5. SUPREME COURT.

Your Committee recommends that this Association urge that two days should elapse between the completion of the hearing of the last case in any Province, and the calling of the first case from the Province next in order on the list.

6. CAPITAL PUNISHMENT.

There is at the present time pending before the House of Commons legislation providing for the carrying out of capital sentences at some central point or points where proper accommodation, protection and equipment can be furnished, and your Committee recommends that such legislation be endorsed.

MARRIAGE AND DIVORCE.

Fifty divorce Acts were passed at the last session of the Dominion Parliament. Of these 26 were granted on the applications of men, and 24 on the applications of women. Owing to the recent decision of the Judicial Committee of the Privy Council, holding that the Provincial Courts in Manitoba, Saskatchewan and Alberta have jurisdiction in divorce, we presume that there will be a considerable reduction in the number of future applications for divorce to the Dominion Parliament. It has been said that there are likely to be above 1,000 cases in Manitoba alone. We trust this is a mere exaggeration; that the married relations in that Province are not so widely strained as this number would lead one to suppose.

With the exception of Ontario and Quebec, all the Provinces of the Dominion have now Provincial Divorce Courts. All efforts to get the Parliament of Canada to take the matter of marriage and divorce in hand, and establish a uniform law throughout the Dominion, have hitherto failed, but it is to be hoped that before long this reluctance to deal with the matter may be overcome, and that the Parliament of Canada will assume that control of marriage and divorce which the B.N.A. Act intends that it shall.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

INSURANCE—STATEMENT IN PROPOSAL FORMING BASIS OF CONTRACT—MISSTATEMENT TO RENDER CONTRACT VOID—ARBITRATION CLAUSE—CONDITION PRECEDENT TO ACTION—CLAIM THAT CONTRACT VOID.

Woodall v. *Pearl Assurance Co.* (1919) 1 K.B 593. This was an act on on an accident policy. In the proposal for the insurance the applicant stated his occupation and signed a declaration that his answers were true, and agreed that the declaration should be the basis of the contract. The policy sued on recited the declaration and stated that it was the basis of the contract and any misstatement therein should render the policy null and void. The policy also contained a condition that in case any question shall arise touching the policy, or the liability of the company thereunder, the assured, if the company required, should be bound to refer the same to arbitration and no person was to be entitled to bring an action except for the sum awarded. The company set up as a defence (1) that the claim was required to be referred to arbitration, and that the obtaining of an award was a condition precedent to bringing an action; (2) that there was a change of occupation by the assured whereby the risk was increased, and that the defendants were therefore not liable. Shearman, J., who tried the action, held that the defendants were insisting, under the terms of the policy, that it was void on the ground of misdescription of the assured's occupation, and that this amounted to a repudiation of the policy and therefore the defendants could not rely on the arbitration clause. And on the merits he found that there was no misstatement or change of occupation by the assured and gave judgment in favour of the plaintiff. The Court of Appeal (Bankes, Warrington, and Duke, L.JJ.), however, held that this view was erroneous and notwithstanding the defendant's contention that the policy was void, they were entitled to rely on the arbitration clause. Their Lordships distinguish the case from *Jureidini* v. *National & B.M.I. Co.* (1915) A.C. 499, on the ground that in that case the defendants repudiated the existence of any contract at all, whereas in the present case the defendants accepted the existence of a contract as a binding contract, but were disputing their liability under t. The action was therefore dismissed, although on the merits the Court of Appeal agreed with Shearman,

J., because the obtaining of an award was made by the contract a cond tion precedent to bringing the action.

CHARTERPARTY—STOWAGE—OWNERS RESPONSIBLE FOR PROPER STOWAGE—CHLORIDE OF LIME STOWED UNDER DECK—INJURY TO OTHER CARGO.

Union Castle S.S. Co. v. *Borderdale Shipping Co.* (1919) 1 K.B. 612. This was an action by the charterers of a vessel against the owners, to recover damages to cargo by reason of the alleged improper stowage by the defendants. The charterparty provided that the charterers shall bear the expense of loading and discharging cargo "but the stowage shall be under the control of the master, and the owners shall be responsible for the proper stowage and correct delivery of the cargo." Chloride of lime in iron drums, apparently in good condition, was stowed under deck by the charterers' agents, neither they nor the master knowing or having any reason to suspect that it would be likely to do harm by being stowed there. The iron drums proved to be defective and fumes escaping therefrom damaged other cargo. The charterers paid the claims of the owners of the cargo thus damaged, and the present action was brought by the charterers against the shipowners to determine which of them was in fact liable for the loss. Bailhache, J., who tried the action, held that the clause as to stowage did not amount to an absolute warranty, and that there had been no negligence on the part of the master and therefore that the defendants were not liable.

CHARTERPARTY—REQUISITION OF SHIP BY ADMIRALTY—SUSPENSION OF HIRE UNDER CHARTER DURING REQUISITION—SALE OF SHIP DURING REQUISITION—REPUDIATION OF CONTRACT.

Omnium D'Enterprises v. *Sutherland* (1919) 1 K.B. 618. This was an action to recover damages for breach of a charterparty. The circumstances were, that by a charterparty in 1916, the defendants chartered the vessel in question to the plaintiffs for three years. The charterparty provided that if the vessel should be requisitioned by the Admiralty the contract with the latter should be for the owners' account, and hire under the charterparty should cease for such period, and that the contract should be prolonged for such period as the vessel might be under requisition so that the full three years' contract between owners and charterers should be carried out. The vessel was requisitioned by the Admiralty and still remained so when the action was begun, but the defendant, whilst the vessel was requisitioned had sold it

free from charter engagements, and the purchasers refused to carry out the charterparty of the plaintiff. Rowlatt, J., who tried the action, held that there had been a repudiation of the contract by the defendants and that the plaintiffs were entitled to recover; and his judgment was affirmed by the Court of Appeal (Bankes, Warrington and Duke, L.JJ.).

INSURANCE (MARINE)—WAR RISK— "WARLIKE OPERATIONS"—SHIP LOST WHILE SAILING IN CONVOY.

British India Steam Navigation Co. v. *Green* (1919) 1 K.B. 632. This was an action to recover against one defendant on a policy of insurance on a vessel "against all consequences of hostilities or warlike operations by, or against the King's enemies" or alternatively against another defendant on a policy of insurance against marine risks. The vessel in question was in a convoy under the direction of a King's officer. The vessels in the convoy were zig-zagging and were upon an unaccustomed course where the currents were variable and of unknown direction and force. The master was not responsible for the course taken, but his business was to keep his position relatively to the other ships in the convoy. There was no negligence proved to have been committed by either the master or the King's officer. In the result the vessel stranded and was subsequently torpedoed. Apart from the torpedoing she would have been a total loss. Bailhache, J., who tried the action, held that the loss was due to a warlike operation. The learned Judge however suggests that if the loss had been occasioned by negligence of the master it would have been a marine risk, whereas if due to negligence of the King's officer it would still have been due to warlike operations.

BANKER—CUSTOMER'S ACCOUNT—DEPOSIT BY CUSTOMER OF STOLEN CHEQUE—CHEQUE PAYABLE TO AND INDORSED BY PUBLIC OFFICIAL—NEGLIGENCE—LIABILITY OF BANKER—CHEQUE DRAWN BY BANKER ON HIMSELF—BILLS OF EXCHANGE ACT, 1882 (45-46 Vict. ch. 61) ss. 3, 72, 82—(R.S.C. ch. 119, ss. 17, 165, 175.)

Ross v. *London County Westminster and P. Bank* (1919) 1 K.B. 678. This was an action by the Paymaster-General of the Canadian Forces to recover for the conversion of certain cheques payable to and indorsed by him, which had been stolen by an official in his office, a quartermaster-sergeant, and deposited to the latter's private account in the defendant's bank and collected by the bank. One of these cheques was drawn by the Dominion

Bank on itself. This cheque the plaintiff contended was not a cheque within the definition given in ss. 3, 72 (R.S.C. ch. 119, ss. 17, 165) but was rather a promissory note and therefore not within the protection of s. 82 (R.S.C. ch. 119, s. 165) on which the defendants relied as relieving them from liability. The plaintiff did not deny that the defendants had acted in good faith, but claimed that they had been negligent in not inquiring as to the right of the depositor to the cheques deposited. The cheques were payable to: "The officer in charge, Estates Office, Canadian Overseas Military Forces," and were indorsed by the officer under the same description. Bailhache, J., who tried the action, was of the opinion that this fact was sufficient to put the bank on inquiry why these cheques were being used apparently for paying the debt of a private individual; and that when such cheques were presented for deposit to a private account a cashier of ordinary intelligence and experience would be put upon inquiry whether or not the credit ought to be given. The learned Judge thought the cheque drawn by the bank itself was a cheque within the Act and came within the same category as the others, and that the negligence of the defendants disentitled them to the protection of s. 82 (R.S.C. ch. 119, s. 175).

ADMIRALTY—COLLISION—LIGHTS—MOTOR AUXILIARY BARQUE—VESSEL UNDER SAIL WITH MOTOR ALSO ACTING—REGULATIONS FOR PREVENTING COLLISIONS AT SEA, ARTS. 2, 20.

The Cupica (1919) P. 122. This was an action in Admiralty for damages occasioned by a collision. The vessel in question was a motor auxiliary barque. At the time of the collision she was under sail but was also using her motor which in the opinion of the Court gave her some extra speed. She was only shewing lights required for a sailing vessel. Roche, J., held she ought also to have shewn lights required to be carried by a steamship under art. 2 of the regulations. The defendant contended that it was the duty of the plaintiff's vessel under art. 20 to keep clear of the defendant vessel. The learned Judge held that both vessels were to blame in equal degree on account of both having had a bad lookout and being badly navigated.

PRIZE COURT—CLAIMANTS—RIGHT TO APPEAR—PROPERTY IN GOODS NOT IN CLAIMANTS AT DATE OF SEIZURE—PROPERTY IN CLAIMANTS AT DATE OF CLAIM.

The Frogner (1919) P. 127. The simple question decided in this case is that claimants of goods seized in prize are entitled to

appear to make claim, although the property in the goods did not vest in the claimants until after the seizure.

PROBATE—COSTS—CO-PLAINTIFFS PROPOUNDING WILL — WILL OBTAINED BY UNDUE INFLUENCE OF ONE OF THE PLAINTIFFS— COSTS OF INNOCENT PLAINTIFF.

In re Barlow, Haydon v. *Pring* (1919) P. 131. This was an appeal from the decision of Horridge, J. (1914) P. 14. The action was brought by two plaintiffs who propounded a will for probate. The will was set aside as having been obtained by undue influence of one of the plaintiffs. Horridge, J., ordered the costs of the innocent plaintiff to be paid out of the estate and to be repaid by the co-plaintiff to the defendant. The Court of Appeal (Eady, M.R., and Scrutton, L.J.) held that the action should have been dismissed with costs as to both plaintiffs.

WILL—CONSTRUCTION—GIFTS TO NEPHEWS AND THEIR ISSUE AS TENANTS IN EQUAL SHARES PER STIRPES—COMMENCEMENT OF STIRPITAL DIVISION.

In re Alexander, Alexander v. *Alexander* (1919) 1 Ch. 371. In this case the question to be determined on the construction of a will was when a stirpital division was to commence. By the will in question the testator gave a fund upon trust for certain persons for their lives or life and after the death of the survivor he directed the fund to be held in trust for such of his nephews and nieces (being children of my own brothers and sisters) living at the death of the survivor of the life tenants, and for the issue then living of any such nephews and nieces of mine who may have previously died as being male shall have attained 21, or being female should have attained that age or married, and if more then one as tenant in equal shares per stirpes. Sarah Alexander, the last survivor of the tenants for life died. The testator had four brothers, and nineteen nephews and nieces the children of these brothers Fourteen of these survived Sarah Alexander, and five predeceased her, and of the latter four left children and one of them left a child. It was conceded, (1) that the word 'issue" in the bequest was not confined to children but included issue of all degrees; (2) that issue of a more remote degree in the same line of descent were excluded by those of a nearer degree; (3) and that issue took as tenants in common. Sargant, J., who heard the application, held that the stirpital division took effect on the death of the surviving tenant for life

and the fund was then divisible into nineteen parts—being the number of nephews and nieces who survived her either by themselves or by their stocks.

VENDOR AND PURCHASER—AGREEMENT FOR SALE OF LAND SIGNED BY AGENT LAWFULLY AUTHORIZED—OMISSION OF TERM — WAIVER — SPECIFIC PERFORMANCE — STATUTE OF FRAUDS (29 Car. 2, c. 3) s. 4—(R.S O. c. 102, s. 5).

North v. *Loomes* (1919) 1 Ch. 378. This was an action for specific performance of a contract for the purchase of land in which two questions arose, (1) whether the purchaser had by his agent signed a memorandum in writing sufficient to satisfy the Statute of Frauds (29 Car. 2, c. 3) s. 4 (R.S.O. c. 102, s. 5), and (2) whether the omission of a term in favour of the vendor from the written contract was any bar to specific performance, the vendor waiving that term. A verbal agreement was made for the sale and purchase of the premises in question at a specified sum and t was agreed that the purchaser should pay the vendor s costs. The purchaser paid a deposit of £50 whereupon the vendor gave him a receipt which specified the premises, the price and the balance due, but omitted any statement as to costs. This receipt the purchaser sent to his solicitor to whom the vendor's solicitor sent a draft contract for perusal and approval. The purchaser's solicitor wrote back: "I need not trouble you to send me another contract as the one which your client has signed is quite sufficient." Younger, J., who tried the action held that this letter was sufficient to bind the purchaser under the statute, and that the omission of the term as to costs was not open to the defendant as a defence as the plaintiff did not seek to enforce that part of the agreement which was solely for his benefit and moreover, in the opinion of the learned Judge, the point was not open to the defendant, because it was not specifically raised on the pleadings; and the defence of the statute was pleaded to the contract as pleaded by the plaintiff, and the production of the signed memorandum was a complete answer to that plea.

ANCIENT LIGHTS—THREATENED OBSTRUCTION OF LIGHTS—QUIA TIMET ACTION FOR INJUNCTION—PROSPECTIVE DAMAGE SUBSTANTIAL—DECLARATORY JUDGMENT—COSTS.

Litchfield-Speer v. *Queen Anne's Gate Syndicate* (1919) 1 Ch. 407. This was an action *quia timet* to restrain the defendants from interfering with the plaintiff's ancient lights by the erection of buildings on the opposite side of the street. The plaintiffs

had torn down buildings which were about 46 feet high and were proposing to erect in their place buildings 84 feet high. At the time of the trial the new buildings had not reached the height of the old buildings which had been torn down. It was contended on behalf of the defendants that since the decision of the House of Lords in *Colls* v. *Home & Colonial Stores* (1904) A.C. 186, the Court would not grant an injunction in a *quia timet* action unless it is shewn that damage will inevitably result and will be irreparable. Lawrence, J., who tried the action, held that it was maintainable, and he made a declaratory judgment in favour of the plaintiffs' rights and gave them liberty to apply for an injunction. The plaintiffs having claimed for more lights than they were able to shew themselves entitled, the learned Judge gave them only one-half the costs of the action and made no order as to the other half.

COMPANY—VOLUNTARY LIQUIDATION—LEASEHOLD PREMISES—OCCUPATION OF LEASEHOLD PREMISES BY LIQUIDATOR—DILAPIDATION—BREACH OF COVENANT TO REPAIR—RIGHT OF REVERSIONER TO BE PAID IN FULL.

In re Levi & Co. (1919) 1 Ch. 416. A company being the assignee of certain leasehold premises subject to covenants to repair and deliver up in good repair, went into voluntary liquidation, and for the purposes of the liquidation the liquidator entered upon and occupied the leasehold premises and continued in possession until the lease expired, in the meantime receiving large profit rental from under-lessees of parts of the premises. When the lease expired it was found that the premises were considerably out of repair. The liquidator made a summary application to the Court to determine whether the reversioners were entitled to be paid in full their claim for damages for breach of the covenants to repair and leave in repair or whether they were only entitled to such dividend as was payable to the creditors of the company. Although there appears to be no direct authority on the point, Astbury, J., held, following the cases which have decided that in such cases rent and other outgoings are payable by the liquidator, that where a liquidator for the purposes of the liquidation continues in possession of leasehold he does so subject to the terms of the lease including covenants for repair, and that the reversioners were entitled to be paid in full.

SOLICITOR—CHARGING ORDER—"PROPERTY RECOVERED OR PRESERVED"—PROPERTY OF PERSON NOT EMPLOYING SOLICITOR—PLAINTIFF MAKING CLAIM TO PROPERTY OF DEFENDANT—APPOINTMENT OF INTERIM RECEIVER ON PLAINTIFF'S APPLICATION—SUBSEQUENT ABANDONMENT OF CLAIM BY PLAINTIFF.

Wingfield v. *Wingfie'd* (1919) 1 Ch. 462. This was an application by the plaintiffs' solicitor for a charging order in respect of his costs, in the following circumstances: the action was by a wife against her husband claiming to be the owner of certain chattel property; an interim receiver was appointed of the property on the application of the wife who subsequently abandoned her claim in the action. Peterson, J., was of the opinion that the appointment of a receiver was a preservation of the property, and granted the order, but the Court of Appeal (Eady, M.R., Scrutton, L.J., and Eve, J.) unanimously reversed it, holding that the making of an unfounded claim to property of another could not furnish any basis for a charging order in favour of the claimants' solicitor on the property wrongfully claimed.

RAILWAY COMPANY—REFRESHMENT ROOMS—OPTION OF RENTING—CHOSE IN ACTION—ASSIGNABILITY—UNCERTAINTY—ULTRA VIRES.

County Hotel & Wine Co. v. *London and N.W. Ry.* (1919) 2 K.B. 29. This was an appeal from the judgment of McCardie, J., (1918) 2 K.B. 251 (noted *ante*, vol. 54, p. 434). The question at issue was the enforcement of an agreement made by the defendants with the plaintiffs' assignor contained in a lease assigned to the plaintiffs, whereby it was claimed that the tenant was to have the option of renting the refreshment rooms at the defendants' station. McCardie, J., dismissed the action on the ground that the agreement was void for uncertainty and if not it was *ultra vires* of the defendant company; and the Court of Appeal (Bankes, Warrington, and Duke, L.JJ.) have affirmed his decision, but not on the grounds he assigned, but because in their view, on a proper construction of the contract, there had been no breach; their lordships being of the opinion that what the contract really meant was, that if the defendants were minded to offer the refreshment rooms at a rent to anyone, the occupier of the plaintiffs' hotel should have the option of taking them at that rent.

Bench and Bar

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LAWYERS IN PARLIAMENT.

We trust the politicians of the two political parties whose respective applecarts were so unceremoniously upset by the rural electors at the recent provincial election in Ontario are recovering from the stupor occasioned thereby.

One feature of this surprising political upheaval, whereby the hitherto politically submerged tillers of the soil have come to the top, is the fact that in the Farmer Cabinet there is only one lawyer to aid in steering the somewhat unwieldy or at least the untried barge that is to carry the new Government through the rapids and tortuous channels of its first political voyage. In the past the Premiers of this Province (with one exception) have always been lawyers. In the first Cabinet, led by John Sandfield Macdonald, there were four, all of eminent ability, and in the Government just defeated there were five.

To a professional man and to those versed in parliamentary procedure the reason for this preponderance is obvious. The work of the Government is very largely a question of law; and law, of all things, is a thing with which those who have no legal training are incapable of dealing; and the person who attempts so to do only gets himself and others into difficulties.

The administration of justice and the making of our statute law, confessedly two of the most important branches of the government of any country, are subjects with which only trained and skilful lawyers are competent to deal; any ignoramous assuming their control would flounder in the mire or would be practically at the mercy of others. We fear that this has been lost sight of by the new Government. To assume that a Government can be successfully carried on without the aid of a sufficient force of

trained legal minds is a false assumption, which is likely to lead to some fatal and disastrous mistake.

There are however amongst those who will sit to the left of the Speaker, or on the cross-benches, a few lawyers who have escaped the wreckage of the old political parties. Let us hope for the honour of the profession, and for the good of their country, that they will, with true patriotism and self abnegation, when occasion demands it, give a helping hand to the lonely lawyer who will as Attorney-General probably have much to say in steering the Farmer Government through the difficulties which it will meet with on this its first parliamentary voyage.

We understand that Mr. W. E. Raney, of Toronto, K.C., an occasional contributor to the columns of this journal, has been selected to fill the office of Attorney-General in the new Government. He is a capable and respected member of the profession, and, though without parliamentary experience, can be trusted faithfully to fulfil the duties of his difficult position. There is the consolation of knowing that the permanent heads of the legal departments of the Government are a competent body of men who will be able to some extent to make up for the lack of the usual quota of professional men in the new Cabinet.

The serious aspect to this question cannot be overlooked. The truth is that no Government can be carried on to the advantage of the public and with due regard to the stability of our institutions and the due administration of justice without the aid of professional lawyers of experience. There has been a feeling in the minds of farmers and others, who have no knowledge of the actual work of the Government, that there have been in the past too many lawyers in our legislative halls. This is excusable upon the grounds of ignorance, but it is an entirely false idea both in theory and practice. Once and once only in the history of the Motherland has such an idea prevailed; but the Parliament from which the lawyers had been excluded has ever since been known as the "lack learning Parliament."

It is well that the public should know that every lawyer of average experience must necessarily know much about almost every branch of business which calls for legislation; and, if he has ordinary

capacity, his training, experience and wide range of information will prove that he is better qualified than a man of any other class in the community to suggest and guide desirable legislation on any subject that may come up for discussion. And what perhaps is of more value than all, his training teaches him to know men, and gives him that habit of viewing things in a broad spirit, and with a proper sense of proportion, so necessary in a legislator.

We claim also for our lawyer legislators that as a class, in addition to other attributes, they exercise their acquirements and skill with a stronger sense of what is fair to others than appertains to those whose vision is confined to their own trade or calling to a smaller and more personal horizon.

We trust that our brethren realize something of the responsibility and duty which these advantages lay upon us. This duty is aptly expressed in the concluding words of a recent paper by Professor Swan, of the Yale School of Law, where he says: "This period of reconstruction should bring home to the legal profession, not only its duty to lead public opinion on the critical political and social problems which confront our nation, not only its duty to reform defects in the law and its administration, but also its duty to aid in so broadening and deepening legal education that the lawyers of the future may render a still larger public service."

INTERNATIONAL LAW IN RELATION TO INDIRECT BLOCKADE.

This subject was dealt with at some length by Viscount Finlay at the last meeting of the Canadian Bar Association.

This paper, coming as it does from such an eminent jurist, and occupying the highest judicial position in the British Empire, assumes the importance of a supreme judicial utterance. Especially is this so, as the paper was prepared in view of Lord Finlay's impending visit, not only to Canada, but also to the United States of America, which, during the first part of the war, was a neutral country, but later was, most happily, our warm and powerful ally. It will therefore be read with great interest by jurists there as well as here.

He spoke as follows:—

Gentlemen,

I propose to speak to you on some of the lessons of the war as to international law, especially on retaliation and the indirect blockade, as it has been called, which was carried on against Germany by Great Britain latterly in co-operation with the United States of America. My remarks will naturally fall under three heads:

1. The doctrine of retaliation and its effect on neutrals;
2. The doctrine of continuous voyage; and,
3. The system of rationing neutral countries in the vicinity of Germany.

1. RETALIATION. The first observation which comes to me is that it has been thought sometimes that neutrals are affected as regards their use of the high seas by the law only of contraband and of blockade in the strict sense of the term. It has, however, always been a part of international law that the position of neutrals might be affected by reprisals exercised by one belligerent against the other, and that neutrals might to some extent be prejudiced by such reprisals. There is nothing new in this doctrine—it is as old at least as the time of Lord Stowell. Lord Stowell had to deal with the orders-in-council passed by the British Government by way of reprisal for the decrees of Berlin in 1806, 21st November, and of Milan in 1807, 17th August. By these decrees Napoleon affected to put the British Isles into a state of blockade and prohibited all intercourse with them, and all traffic in British merchandise. Having regard to the prodominance of the British navy at that time this proclamation of blockade was most audacious, but as the influence of Napoleon was predominant on the continent his decrees were obeyed by his allies and by those who dreaded his power.

Great Britain retaliated for the Berlin decree by the celebrated orders-in-council of 7th January, 1807, and 11th November, 1807. By the second of these orders there was proclaimed virtually a blockade of France and of the countries of her allies, and of all countries which submitted to Napoleon's decrees at Berlin and

Milan, a blockade which was partially relaxed by order-in-council of 26th April, 1809. A very lucid account of these various decrees and orders-in-council will be found in Manning's Law of Nations, Book III. c. 10, a work which I have found most useful.

In the very recent case of the "Leonora," in which judgment was given by the Judicial Committee of the Privy Council on the 31st July last, reference was made to these orders-in-council in the following terms: In delivering judgment, Lord Sumner said:

"With the terms of the proclamations and orders-in-council from 1806 to 1812, their Lordships are not now concerned. They were such that the decisions on them in many cases involved not merely the use of the term 'blockade,' but discussion of or at least allusion to the nature of that right. It is, however, in their opinion a mistake to argue, as has been argued before them, that in those decisions the right to condemn was decreed to arise from the fact that the cases were cases of blockade, although the occasion for the blockade was the passing of a retaliatory order. In their opinion Sir William Scott's doctrine consistently was that retaliation was a branch of the rights which the law of nations recognizes as belonging to belligerents and that it is as much enforceable by Courts of Prize as is the right of blockade. They find no warrant or authority for holding that it is only enforceable by them when it chances to be exercised under the form or conditions of a valid blockade. When once it is established that the conduct of the enemy gave occasion for the exercise of the right of retaliation, the real question is whether the mode in which it has been exercised is such as to be invalid by reason of the burden which it imposes on neutrals, a question pre-eminently one of fact and of degree."

There has been a great deal of controversy as to these orders-in-council. The right of retaliation, even to the prejudice of neutrals, is unquestioned. Sir William Scott asserted it in the case of the "Fox" (Edwards 311) and pointed out that retaliation might occasion inconvenience to neutrals, and that if the inconvenience occasioned was greater than was necessary and reasonable, it was not enforceable as against them.

The exercise of the right of retaliation is always subject to review in the Prize Court. This is a real safeguard, as is shewn by the decision in the case of the "Zamora" (1916), 2 A.C. 77, which was delivered by Lord Parker of Waddington. I may

pause for a moment to refer to the great loss which our courts in England have sustained by the untimely death of Lord Parker; his was one of the acutest intellects that has ever been brought to bear upon the study of law, whether municipal or international. It was decided in that case that there is no power in the Crown by order-in-council to prescribe or alter the law which Prize Courts administer. The decision on this point followed the principles which were often enunciated by Lord Stowell while it over-ruled a dictum to the contrary which proceeded from that great Judge on one occasion. What Lord Parker said was that the court will give the utmost weight to every such order, short of treating it as a binding declaration of law, and he defined the position of the courts with reference to orders-in-council in the following terms:

"An order authorizing reprisals will be conclusive as to the facts which are recited as shewing that a case for reprisal exists and will have due weight as shewing what, in the opinion of His Majesty's advisors, are the best or only means of meeting the emergency. But this will not preclude the right of any party aggrieved to contend, or the right of the Court to hold, that these means are unlawful as entailing on neutrals a degree of inconvenience unreasonable considering all the circumstances of the case."

If the right of neutrals to carry on trade were absolute, it would make the right of reprisals a mere simulacrum, to borrow a phrase once used in this connection by Lord Sumner. The question always is, is the amount of interference with neutrals unreasonable?

In the present war, Germany entirely threw into the shade the action of Napoleon and the decrees of Berlin and Milan. Napoleon's decrees, outrageous as they were, when compared with the submarine campaign seem innocence itself. The British waters were declared by the German Government to be a "military zone." All vessels trading within that area—British and neutral alike—were to be sunk. There was vast loss of life and untold suffering as the result of this submarine campaign. The provocation offered by Napoleon was nothing to that occasioned by these measures of the Kaiser. Any retaliation in kind by Great Britain was impossible, for two reasons: in the first place, there were no

German ships at sea, and in the second place no English Government could ever stoop to the commission of such outrages as disgraced the flag of Germany. The only possible reprisals were by cutting off the trade of Germany. That trade was carried on entirely through neutrals, as German merchant ships did not venture to cross the seas. Under these circumstances His Majesty's Government passed the order-in-council of March 11, 1915, which was a retaliatory order. It is mild and humane in its provisions, and presents a striking contrast to the German methods.

By this order all vessels sailing after the 1st of March, 1915, for or from any German port, were not allowed to proceed on their voyage—provision was made for their discharge in British or allied ports, and for the cargo being put into the custody of the Marshall of the Prize Court, and the goods or proceeds of the sale were ultimately to be dealt with as appeared just. This order further provided that goods which were enemy property, or of an enemy origin or destination found on any vessel sailing after the 1st March, 1915, from or for any non-German port, should be similarly dealt with.

The validity of this order was attacked in the case of the "Stigstad" (1916), P. 123 and (1919), A.C. 279, but it was upheld as against the neutral by Sir Samuel Evans, whose untimely death we all deplore, and who has left behind him an undying memory as a great Judge in prize cases.

The Stigstad was a neutral ship bound for Rotterdam from Norway. She carried goods intended for Germany and was compelled to discharge them at Middlesborough by an English man-of-war. It was held by the Privy Council affirming in precedent that the neutral shipowner was not entitled to any damages as there had been no unreasonable amount of inconvenience occasioned to him, and the principles laid down in Lord Parker's judgment in the "Zamora" were followed and applied.

In the judgment of the Privy Council, at page 287, after reference to the German outrages at sea, it is said:

"Neutrals whose principles or whose policy led them to refrain from repressive action on their own, may well be called upon to bear a passive part in the necessary suppression of courses which

are fatal to the freedom of all who use the seas. The argument principally urged at the Bar ignored this consideration and assumed the absolute right of neutral trade to proceed without interference or restriction unless by the application of the rules heretofore established as to contraband traffic, un-neutral service and blockade . . . For this contention no authority at all was forthcoming . . . To deny to the belligerent under the head of retaliation any right to interfere with the trade of neutrals beyond that which, quite apart from circumstances which warrant retaliation, he enjoys already under the head of contraband, blockade and un-neutral service, would be to take away with one hand what had been formally conceded with the other."

To put it shortly, the principle is that neutrals must submit to such inconvenience so long as it is not more than is necessarily incident to the exercise of retaliation.

The German submarine outrages continued and multiplied, and an order was made by the German Government on the 1st February, 1917, prohibiting all traffic in certain zones over widespread areas of the high seas affecting to regulate even trans-Atlantic traffic, prescribing zones and routes and enacting that vessels were to be painted in a special fashion like barbers' poles, as was said in the United States, and warning neutrals that if vessels entered the forbidden zones they would be there at their own risk. On the 16th February, 1917, His Majesty issued a second order-in-council, also by way of retaliation. It will be found in the London *Gazette* of 20th February, 1917. The effect of this order was:

"(1) To give effect to a very reasonable presumption by prescribing that any vessel going to or from any neutral port affording access to enemy territory without calling at a British or allied port, was, till the contrary was shewn, to be deemed to be carrying goods with enemy destination or of enemy origin, and was to be brought in for examination and, if necessary, for adjudication.

"(2) Any vessel carrying goods with enemy destination or of enemy origin was declared to be liable to capture and condemnation unless she called at a British or allied port for examination.

"(3) Goods of enemy origin or destination were declared to be liable to condemnation."

Every care was taken to minimize the inconvenience of calling

at British ports. Halifax was allowed as more convenient than Kirkwall and Falmouth.

The validity of this order was called in question in the case of the "Leonora," that very recent decision of the Privy Council to which I have already referred. In that case the vessel was carrying coal from Belgium (while in German occupation) for Sweden, and she had not called for examination at any British port. The ship and cargo were condemned and the validity of the order-in-council of 16th February, 1917, was upheld.

The "Leonora" is a leading case in international law, and I may be permitted to refer particularly to the scope and effect of the judgment of the Privy Council.

My references are to the printed judgment, delivered by Lord Sumner at the Privy Council; it has not yet been published in the law reports.

On page 3, he states what was the ground of attack on the order-in-council:

"The appellant's main case," he says, "was that the order-in-council was invalid principally on the ground that it pressed so hardly on neutral merchants and interfered so much with their rights that as against them, it could not be held to fall within such right of reprisal as a belligerent enjoys under the law of nations."

On page 4, he goes on to point out that:

"There are certain rights which a belligerent enjoys by the law of nations in virtue of belligerency which may be enforced by us against neutral subjects to the prejudice of their perfect freedom of action, and this because without these rights maritime war would be frustrated and the appeal to the arbitrament of arms made of none effect."

Again on page 4 he lays down what the sanction is:

"Disregard of a valid measure of retaliation is against neutrals just as justiceable in a Court of Prize as breach of blockade or the carriage of contraband of war. The jurisdiction of a Court of Prize is at least as essential in the neutral's interest as in the interests of the belligerent, and if the Court is to have power to release in the interest of the one, it must also have inherent power to condemn in justice to the other."

The appellants had argued that the order-in-council pur-

ported to create an offence in failure to call at a British or allied port, which is unknown to the law of nations, and on page 5 occurs a passage dealing with this point which from its importance I cite textually:

"In the terms of the present order, which says that a vessel shall be 'liable to capture and condemnation' and that 'goods should be liable to condemnation,' some argument has been found for the appellant's main proposition that the order-in-council creates an offence and attaches this penalty, but their Lordships do not accept this view. The order declares by way of warning and for the sake of completeness the consequences which may follow from disregard of it, but if the occasion has given rise to the right to retaliate, if the belligerent has validly availed himself of the occasion, and if the vessel has been encountered at sea under the circumstances mentioned, the right and duty to bring the ship and cargo before a Court of Prize, as for a justiceable offence against the right of the belligerent, has arisen thereupon, and the jurisdiction to condemn is that which is inherent in the Court."

Again on page 8 is found a statement of the principle:

"The right of retaliation is a right of the belligerent, not a concession by the neutral. It is enjoyed by law and not on sufferance and doubly so when, as in the present case, the outrageous conduct of the enemy might have been treated as acts of war by all mankind."

It must not be forgotten that while war brings upon neutrals a certain amount of hardship it may also give them the opportunity of making very considerable profits. I think that Sir Samuel Evans on one occasion remarked that neutrals said more about the former than about the latter.

II. Continuous Voyage. The application of reprisals directed against the trade of Germany was complicated by the fact that during the war Germany did not import directly to her own harbours, but drew her supplies through surrounding neutral countries—Holland, Sweden, Norway and Denmark. The problem was solved largely by the application of the doctrine of continuous voyage, in the establishment of which the Prize Courts of the United States have played so conspicuous a part.

The doctrine of continuous voyage had humble beginnings. In 1756, and later in the course of the great war between England

and France, it was applied in dealing with neutrals who took part in trading with the enemy's colonies, which, in times of peace, had been open only to French subjects. During the war French colonial trade was thrown open to the Dutch and to other neutrals, and the same thing occurred with the Spanish colonial trade. The English treated those neutral vessels which availed themselves of the enemy's permission so to trade, as siding with the enemy, and the neutral vessels were captured and forfeited. To avoid the danger of this it became a habit with the neutral merchants to make a colorable importation into a port from which the venture would be permissible. To take a concrete case: A cargo from La Guavra for Bilboa was landed at Marblehead, Mass., and re-embarked for Bilboa. The case came before Lord Stowell, who asserted the doctrine of continuous voyage in these words:

"It is an inherent and settled principle in cases in which the same question has come under discussion that the mere touching at any port without importing a cargo into the common stock of the country, will not alter the nature of the voyage, which continues the same in all respects, and must be considered as a voyage to the country to which the vessel is actually going for the purpose of delivering the cargo at the ultimate port." (The "Maria," 1805, 5 C. Rob. 368.)

In the case of the "Maria" the device was transparent, but the same principles will apply in the case of trans-shipment into another vessel. In the American Civil War the doctrine of "continuous voyage" leaped into fame. You are all aware that Nassau in the Bahamas became a great emporium. Ships came across the Atlantic Ocean bound for Nassau with cargoes which were there to be trans-shipped and taken to Confederate ports. In the case of the "Bermuda" (1865), 3 Wallace 551, the vessel was seized on a voyage from England to Nassau, and the Supreme Court of the United States decided that as the real ultimate destination of the goods was hostile, the interposition of another port between the neutral port of departure and the belligerent destination was of no avail. "A transportation from one port to another remains continuous so long as intent remains unchanged, no matter whether stoppages or trans-shipments intervene."

In the case of the "Springbok" (1866), 5 Wallace 1, the vessel was in like manner seized before arriving at Nassau and the cargo was condemned on the same ground as in the "Bermuda." The case is of some importance, because Lord Russell, the English Foreign Secretary, refused to intervene on behalf of the cargo owners on the ground that the real destination of the cargo was not Nassau, but for a belligerent port. These decisions gave rise to a great outcry and were denounced as involving "a violent extension" of the doctrine of continuous voyage. But it is now quite apparent that these decisions of the Supreme Court were based on common sense, and I think I may say that they are, at the present date, universally recognized as forming part of international law.

The question arose again in 1900, during the war between England and the Boers. The Transvaal had no port, and consignments were made to the Portuguese port of Lorenzo Marquez, whence cargoes were to be taken to the Transvaal by rail. As Law Officer I had a great deal to do with the discussions which then arose. Great Britain claimed the right to seize such goods on their way to Lorenzo Marquez, and Lord Salisbury invoked the doctrine of continuous voyage. One precedent on which Great Britain relied was set in 1896 by the Italian courts, who applied the doctrine in the case of the "Doelwyck," a Dutch ship with a cargo of arms consigned to the French port of Djibutil in the Red Sea, but really intended for transmission to Menelik, King of Abyssinia, than at war with Italy, and, to conclude this historical sketch, I think I may say that the doctrine of continuous voyage has been finally established by the action of the allied powers in the course of the present war.

In an otherwise admirable work, "Hall's International Law," there occurs a strong attack on these decisions of the Supreme Court of the United States. This work has run through many editions. The passage still stands in the text, but it is in strong contrast with the notes which in the later editions trace the subsequent history of the doctrine and shew the triumph of the American view of continuous voyage. I should like to suggest for consideration whether, in the next edition of "Hall's Inter-

national Law" this passage should not be recalled. The work is a most valuable one. Every student of international law is proud to acknowledge his obligations to it, and I cannot help thinking that the emendation which I suggest would be the removal of a blot.

If follows from the doctrine of continuous voyage that goods consigned to ports in neutral countries in the neighborhood of Germany, and intended for transmission to Germany, might for the purpose of reprisals be treated as consigned to Germany just as much as if they had been bound direct for a German port. The doctrine of continuous voyage was of course also applicable in the case of contraband intended for Germany, and its scope in this respect was greatly increased by the disappearance of the importance of the distinction between conditional and absolute contraband. Take the case of foodstuffs. The question whether they were contraband might depend on whether they were intended for the use of the civil population in the enemy country, or for the enemy forces. This test was easy to apply in the days of Grotius, and for a long time afterwards, when one had to deal with relatively small standing armies, and, having regard to the want of facilities for transport in those days as compared with the present, it was comparatively easy to ascertain whether the foodstuffs were really intended for the use of the civil population, or for the use of the armed forces of the country. The distinction is not so easy to draw now that we have the spectacle of whole nations in arms.

* * * * *

III. RATIONING. Germany had attempted to starve England into submission by the submarine campaign and the object which England had in view was to establish an indirect blockade of Germany. In other words, England proposed while avoiding, as far as possible, any interference with imports into neutral countries near Germany, so far as they were wanted for the supply of their own needs, to prevent these countries from being used as conduits for the supply of Germany. This object was achieved by the adoption of a system of rationing these neutral countries according to their normal supply in pre-war days. The restric-

tions of imports through neutral countries was effected by means of the prevention of trade in exercise of the right of retaliation and by the enforcement of the law of contraband. If, during the war, a neutral neighbor of Germany imported three or four times as much as she had imported before the war, the inference was obvious that the surplus would go to Germany. This excessive import to neutral countries was stopped by agreements entered into with bodies representing the traders of the neutral country. These neutral countries were rationed according to their pre-war standard, and the goods were imported on the terms that they should be used for the neutral's own wants and that they should not go to Germany.

This system of "rationing" was most effective. It was, in the great majority of cases, carried out by agreement, so that no difficulty could arise with regard to the question whether the destination of any particular consignment was hostile, as it might have arisen if the rationing had been carried out under compulsion. Such difficulties might not have been insuperable, but rationing by agreement was far more effective and worked more smoothly than rationing by compulsion could have done.

* * * * *

The prime and decisive factor in the success of the pressure which the allies were able to bring to bear upon German trade was, of course, the predominance of British naval power. But it is mere justice to say that the successful conduct of the "indirect blockade" was very largely due to Lord Robert Cecil, who, during a long and critical period, was Minister of Blockade. He is, in my opinion, entitled to a great part of the credit for the triumph of civilization over barbarism in this great struggle, and he can with truth say that the weapons with which he fought were—unlike those of our opponents—not those of barbarism.

May I be permitted to observe in conclusion that one most conspicuous element in the defeat of the submarine campaign—the most notorious in the history of the world—has been the constant and unflinching courage of the sailors of the mercantile marine, of the British Empire, of the United States, and of the neutral as well as the allied nations. If Germany hoped that by

her brutal methods she might create a panic among sailors and prevent ships putting to sea, she must now realize how gross was the delusion in reliance on which she entered on her career of crime. It has ended as it deserved to end, in failure and in shame, and those who would have gloried in its success are fain to find apologies for their complicity.

THE LEGAL PROFESSION IN RELATION TO ETHICS, EDUCATION AND EMOLUMENT.

These subjects were dealt with by Sir James Aikins, President of the Canadian Bar Association, in a very happy manner in his Presidential address at the meeting in Winnipeg last August. Want of space prevents our giving his address in full, but we make room for its concluding pages as follows:—

Legal Education and Ethics.

As we are ministers or agents of the law, the habit of our thought in all our professional and public activities should be, "Does this serve the State?" To so regard our services is to put our profession on its true and best plane. That habit should be struck in early with our students that they may have the right spirit as well as the trained mind. It is the false notion of democracy that the right to practice law should be free for all, that anyone can practice it, and without serious loss to the public, operate or help to operate the expensive and intricate machinery of justice which the State creates for its safety and well-being. The administration of justice has always touched the nadir of its decline when the profession has been lowest in morals and least educated. In such times there is seen a tendency on the part of practitioners to regard the work of the Bar as a trade and not a profession, a thing to be bartered and not a national service to be sought after; then also is found the pettifogger, the ambulance chaser, the fabricator of evidence and the trickster, and the man who is alien to the professional spirit and its traditions, destitute of gentlemanly instincts, disrespectful to his seniors, and a slanderer of Judges. Students-at-law should know the ethics of the Bar.

Deficiency in legal education also causes serious public injury. How can one not versed in the law and the procedure of the courts wisely advise in the one or safely proceed in the other? Who of us has not too often seen through such ignorance needless loss of time and money, to say nothing of the loss of good feeling, from the clients' statements of claim and defences shewing no legal wrongs or rights, perhaps ignoring both even where they exist, needless and useless and ill-launched court motions, appeals and examination of witnesses, improper evidence tendered and vehemently urged upon the court, prolonged and lengthy arguments and citation of cases. What clogging of the wheels of justice, what extravagant abuse of an essential system of justice and court organization, for which the people pay, and this largely through both lack of character and knowledge of the law. How are we to maintain the efficiency of the profession and its honour save by care in selecting those as students who possess the qualifications of mind and character, and then training both with exactitude in the practitioner's office or in the law school, so that they, being masters of their calling, may be happy in their work at the Bar and helpful to the community?

It cannot be expected that the profession will attract those who when trained in the law and practice will make the most useful and successful lawyers unless there are adequate rewards for meritorious services. Such rewards have almost invariably been low, and at these times of soaring values for material things and doubling wages in trades and businesses are, to say the least, meagre. What if the lawyers at the Bar and on the Bench were to combine and strike for higher pay? What riotous joy that would bring to the law-breaker and the anarchist! Notwithstanding frequent jibes, the public regard of the profession is such that even to the veriest Bolshevist the idea is inconceivable. Yet there are individuals and corporations who would treat the members of the Bar as unskilled laborers, and endeavor to secure their highly-trained services at bargain-counter prices. In some cases this has been successful, but not infrequently in the end most expensive to the client. To guard against clients of that class in most Provinces there are Standard Solicitors' Tariffs,

indicating reasonable fees as a guide to both the public and the younger members of the profession, and which should be adjusted by the profession to suit the times. An educated and just public opinion will uphold the payment of such fair rewards for meritorious services.

Professional Rewards.

The Canadian Bench, by the high character and efficient work of the Judges, has had the confidence of the people; its integrity has not been impeached, yet when representatives of this Association pressed the resolution passed by it urging an increase of salary, they were met by curt remarks from some knocking members of Parliament that the Judges were well paid for the work they did; that if they did not like their jobs, others would be glad to take them and the accompanying pay; that half the number of vigorous men would be sufficient, while ill-disposed labour agitators point to the Judges as examples of wage-earners who work less than six hours a day and 44 hours a week. To us who know their intellectual and experienced service and the hours of work in court and study, the answers to these derogatories are obvious. Even if in individual cases such remarks were not devoid of truth, the remedy lies in reducing the number where there are too many, and in a more careful selection, if they do not possess all the physical, mental and moral qualifications, but not in maintaining discouragingly low salaries, or making any increase an excuse for taking the whole. If, when the judicial compensation is made adequate, the appointing authority would ask the official societies representing the legal profession in each of the Provinces for the names of a number of the leaders of the Bar from whom to select, and would appoint from that number, the Bench would be most ably filled and the Bar would be the interested defender of its dignity and efficiency. In the performance of this highest duty of government so fundamental to a nation's quietness and confidence, the influence of political partisans should be rigorously excluded. If the salaries are adequate and the selection and appointment is made as suggested, from among the leaders of the Bar, the effect will be, as experience has demonstrated, to create

a higher type of barrister and advocate, well skilled in the law, gentlemanly in conduct, kindly disposed to his fellow practitioners and of a public spirit. Generally tending toward the same end will be the frequent meetings of the members of each of the Provincial Bars. None can commend too highly the official law and Bar societies, those bulwarks protecting the people against incompetent and unscrupulous men posing as lawyers, and thus guarding the honour of the profession. Their functions are largely executive. They, however, do not bring together the legal units in the nation undoubtedly influential in the localities where they practice, but whose efficiency for good in advancing jurisprudence, perfecting the laws and the administration of them, and in other ways would be greatly increased by concerted effort. To secure such concentrated action; to support and encourage the excellent executive work of the official law and Bar societies; to develop the co-operative spirit of the profession, Provincial Associations have been formed, and this Association was called into existence. Let us hope that in these, all members of the Bar, the Judges included, will cordially join and co-operate.

VISCOUNT FINLAY, AT OSGOODE HALL.

The Bar of Ontario had the pleasure and profit, last month, of meeting the ex-Lord High Chancellor of England, and hearing from him "a most instructive and interesting address" (as the Chairman appropriately styled it) on matters of interest to the profession. After a lunch given by the Benchers to their illustrious guest, he spoke to a large gathering of the Bar assembled in Convocation Hall, Osgoode Hall, Toronto. It is to be regretted that no arrangement had been made for a verbatim report of his address, for it was full of matters well worthy of being recorded in his own words. Dr. Hoskin, K.C., the Treasurer of the Law Society of Upper Canada, presided, and introduced the speaker in his own happy manner.

Among the subjects referred to by Lord Finlay was the Judicial Committee of the Privy Council. This was especially

interesting, as many of those present had secured the services of the then Sir Robert Finlay as leading counsel in cases on appeal to that august forum. He spoke very strongly of its helpfulness in cementing the ties which bind the Empire together. His reminiscences of the Inns of Court in England were very interesting, and led to his emphasizing the desirability of fostering the *esprit de corps* of the Bar, and increasing the cammaraderie of the English and Colonial Bars. Sir Robert Finlay having been retained in most of the cases which came before the Lords of the Privy Council in those days, had exceptional means of forming a judgment on the subjects referred to. He gave pointed attention to the subject of legal education, and the necessity of wide reading and literary culture outside the mere reading of law; "Students should not confine themselves to the study of law alone. If you do, you will not be a good lawyer. You must remember that the law concerns itself with mankind, and is as broad as that word." He referred in feeling terms to the kind reception he had everywhere received during his visit, and paid a graceful tribute to the part Canada had taken in the great war, and to the heroism of her sons.

CHANGING NAMES.

There has recently been an epidemic of name changing, largely among persons of foreign birth, which may perhaps be accounted for in some instances, though not in all, by the desire to obey the instinct of self-preservation which has induced some of them in such times as we have been passing through, to "stand from under" and get into good company; but this is by no means the only compelling reason. There have always been those who, for a variety of reasons, desire to be known by some name other than the one their fathers bore. It is surprising that there seems to be no general law governing and regulating such changes.

Difficulties and inconveniences, as may well be imagined, often arise from the changing of names, and this should, as far

as possible, be obviated or minimized. For example, complications, doubts and uncertainties naturally arise in reference to titles, as to executions against lands in a sheriff's office, and in numberless other ways. We are not at present prepared to suggest what legislation would be appropriate or helpful in the premises, but the subject certainly deserves the attention of the proper authorities.

We are not aware whether there is any legislation on the subject in other Provinces; but, in Ontario, there is none. A practice has, however, grown up there of filing in the Office of the Clerk of Records and Writs of the Supreme Court a deed poll executed by a person changing his name declaratory of his having done so and notifying the public thereof. This notice, by the way, is seen by no one but the man himself and the clerk, and is therefore valueless. Why filed there, no one knows. It might be of some use if filed in the Registry Office.

In the State of New York there is some legislation, for we find the following in Consolidated Laws, vol. II, 1909; Executive Law, sec. 34: "Provides that in reference to the publication of a statement of names changed, the Secretary of State must cause to be published in the next volume of the session laws following the report of names changed made to him by County Clerks pursuant to the County law, a tabular statement shewing the original name of each person and corporation and the name which he or it has been authorized to assume."

We should welcome any suggestions that might occur to any of our readers in reference to this matter.

LIABILITY OF CARRIER FOR LOSS OF BAGGAGE.

In a recent case of *Wilkinson* v. *Westlake*, 17 O.W.N. 98, which was an action against a carrier for the loss of a trunk, it appeared that in the trunk in question there was contained an artificial limb belonging to the plaintiff's brother; and for this the learned Judge who tried the action held that the plaintiff could not recover.

A somewhat similar point arose in the recent case of *Jenkyns* v. *Southampton* (1919), 2 K.B. 135, where the lost suitcase of the

plaintiff contained, among other things, a pair of borrowed binoculars. As to them, Lush, J., said: "With regard to the glasses there is no ground whatever for saying that a borrowed article cannot be personal luggage. It is the property of the borrower for the time being and if it is lost a passenger can recover its value just as if it was his own." None of the other Judges who dealt with the case offered any dissent to this statement of the law. If this view of the law is correct, then it would appear that the plaintiff in the *Wilkinson* case was equally entitled, as the bailee of the artificial limb, to recover its value without any amendment.

FORTUNE-TELLING AND VAGRANCY.

If the law is as understood by the *Law Times* (Eng.), it is time it was changed. If *Davis* v. *Curry* is law it opens a wide door to criminals seeking to evade the law on other subjects besides fortune-telling. The writer says:

"Considerable prominence has been given in the lay press to the decision of Mr. Ralph Bankes, K.C., at the South-Western Police Court, dismissing a summons under the Vagrancy Act, 1824, for professing to tell fortunes with intent to deceive. The ground upon which the learned magistrate acted was that he was satisfied that the defendant believed that she had the power of foretelling the future. The dismissal of the charge was therefore the logical outcome of the decision of the Divisional Court in *Davis* v. *Curry*, 117 L.T. Rep. 716, where Mr. Justice Darling and Mr. Justice Sankey held that an intention to deceive was one of the ingredients of the offence, though Mr. Justice Avory thought otherwise, considering that the question of *bona fides* was irrelevant. The present case apparently was one of those referred to by Mr. Justice Darling when he said, 'I can imagine very few cases in which the magistrate would find it to be his duty to acquit,' but, owing to the undoubted harm that results from the actions of palmists, clairvoyants, and the like, an absolute prohibition would be welcome."

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

FACTORY—FENCING MACHINERY—FENCING COMMERCIALLY IMPRACTICABLE—INJURY TO WORKMAN—LIABILITY OF EMPLOYER—FACTORY AND WORKSHOP ACT, 1091 (1 EDW. 7, c. 22), s. 10 (1) *c*—(R.S.O. 1914, c. 229, s. 55).

Davies v. *Thomas* (1919) 2 K.B. 39. This was an action by a workman against his employer for damages occasioned by a machine which was not securely fenced. It appeared by the evidence that it was commercially impracticable to fence the machine in question, but Salter, J., who tried the action, held that a breach of the Factory and Workshop Act (1 Edw. VII. c. 22), s. 10 (1)(*c*), had been committed and that the defendant was liable. Whether this decision would be applicable to the construction of R.S.O. 1914, c. 229, s. 55 (1) *a*, is open to doubt, having regard to the words "as far as practicable."

FIRE—LIABILITY FOR DAMAGE TO ADJOINING PREMISES— "ACCIDENTAL FIRE"—NEGLIGENCE IN NOT CHECKING SPREAD OF FIRE—FIRES PREVENTION ACT, 1774 (14 GEO. III. c. 78), s. 86—(R.S.O. c. 118).

Musgrove v. *Pandelis* (1919) 2 K.B. 43. This was an appeal from the judgment of Lush, J. (1919) 1 K.B. 314 (noted *ante* p. 184). The Court of Appeal (Bankes, Warrington and Duke, L.JJ.) affirmed the judgment, deciding in effect that if a fire accidentally begins on a man's premises and, by his negligence, it is not extinguished but spreads to and destroys his neighbour's property, he cannot rely on the above mentioned Acts as a protection on the ground that the fire was accidental. Their Lordships were of the opinion that the case came within the principle of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, because the motor car in which the fire started was a dangerous article, and the defendant, having brought it on his premises, was responsible for the fire which resulted.

ROYAL NAVY—FREIGHT ON GOODS CARRIED—CLAIM BY OFFICER—FREIGHT FOR TREASURE ACT (59 GEO. III. c. 25)—ORDERS IN COUNCIL, AUG. 1, 1888, OCT. 26, 1914.

King-Hall v. *Standard Bank* (1919) 2 K.B. 52. This was an action by a commanding officer of the Royal Navy to recover freight on £8,000,000 bullion carried by his ship from South

Africa during the war, belonging to the Bank of England. The defendants were the bank by which the bullion was shipped. Bailhache, J., by whom the action was tried, held that under the statute 59 Geo. III. c. 25, no freight was recoverable for the service rendered: the Order in Council of Oct. 26, 1914, which annulled the prior Order in Council of Aug. 1, 1888, which allowed 1%, having made no provision for any other allowance.

PUBLIC HEALTH—FOOD—UNSOUND MEAT—DEPOSIT FOR SALE—PUBLIC HEALTH ACT, 1875 (38-39 VICT. C. 55) SS. 116, 117—53-54 VICT. C. 59, S. 28—(R.S.O. c. 218, s. 100 (1)).

Ollett v. *Henry* (1919) 2 K.B. 88. This was an appeal from magistrates who refused to convict the defendant of a breach of the Public Health Act, 1875 (38-39 Vict. c. 55)ss. 116, 117, as extended by 53-54 Vict. c. 59, s. 28 (see R.S.O. c. 218, s. 100 (1)), in the following circumstances: The defendant was the secretary of a company of meat salesmen to whom the Ministry of Food caused to be consigned a quantity of meat for distribution to local butchers. The company had no choice or selection of the meat so consigned to them; their duty was to distribute it to local butchers, receive the price, and account therefor to the Ministry of Food who allowed them a fixed commission on the price of the meat distributed by them. Among the meat so consigned was found and seized as unfit for human food two carcasses of lamb. The magistrate held that these carcasses were not deposited with the defendant for the purpose of sale, and refused to convict; but the Divisional Court (Bray, Lawrence and Sherman, J.J.) held that the meat was deposited for sale and the defendant should have been convicted.

CARRIER — PASSENGER'S PERSONAL LUGGAGE — BAILMENT TO CARRIER—ARMY OFFICER'S BINOCULAR GLASSES, REVOLVER, EAR DEFENDERS, AND FLASH LAMP—LIABILITY OF CARRIER FOR LOSS OF LUGGAGE.

Jenkyns v. *Southampton etc. Steam Packet Co.* (1919) 2 K.B. 135. The plaintiff in this case was an army officer and claimed to recover from the defendants damage for the loss of his valise containing personal luggage. The circumstances were that the plaintiff became a passenger on the defendants' steamer; at the dock a person apparently a porter, but who was not in the defendants' employment, took charge of the valise and deposited it on the boat where luggage was usually placed, and where it was seen by the plaintiff after the steamer had started. The vessel touched at a port before arriving at the plaintiff's destination, and when it

arrived there the valise had disappeared, having apparently been appropriated by some other person. The valise contained *inter alia* a pair of binocular glasses which had been lent to the plaintiff, a revolver, ear defenders and a flash light. The defendants sought to escape liability for the loss (1) on the ground of there having been no bailment of the valise to them, and (2) because the articles above mentioned do not come within the category of personal luggage. The County Court Judge who tried the action gave judgment for the plaintiff; and a Divisional Court (Lush and Sankey, JJ.) affirmed his decision, holding that there had been a reception of the valise by the defendants when it was placed in the customary place for stowing baggage and that it was immaterial that the man who so placed the valise was not in their employment: also that the articles in question were, having regard to the plaintiff's profession, properly "personal luggage."

SUNDAY—SALE OF MILK DURING PROHIBITED HOURS—ILLEGALITY —ADULTERATION—SUNDAY OBSERVANCE ACT (29 CAR. II., c 7), ss. 1, 3.

Elder v. *Kelly* (1919) 2 K.B. 179, was a prosecution for selling adulterated milk. The defendant sought to escape liability on the ground that the sale was illegal, having been made contrary to the Sunday Observance Act (29 Car. II., c. 7), ss. 1, 3, within prohibited hours; but a Divisional Court (Bray, Lawrence and Shearman, JJ.) held that that fact formed no defence.

GAMING—CHEQUES GIVEN IN PAYMENT OF BETS—CHEQUES INDORSED TO THIRD PERSON—KNOWLEDGE OF INDORSEE AS TO ORIGIN OF CHEQUES—PAYMENT TO INDORSEE BY DRAWER—CLAIM BY DRAWER AGAINST INDORSEE TO RECOVER AMOUNT OF CHEQUES—GAMING ACT, 1835 (5 & 6 W. IV., c. 41), ss. 1, 2 —(R.S.O. c. 217, ss. 2, 3).

Golding v. *Bradlaw* (1919) 2 K.B. 238. In this action the plaintiff claimed to recover from the defendant certain sums paid by the plaintiff to the indorsee of cheques drawn by the plaintiff to the defendant in settlement of racing bets, on the ground that the cheques were void under the Gaming Act, 1835 (5-6 W. IV., c. 41), s. 1, and under s. 2 the plaintiff was entitled to recover (see R.S.O. c. 217, ss. 2, 3). The cheques in question were indorsed to one Lee, who knew the purpose for which they were given, and he presented them at the plaintiff's bankers and received payment thereof. Bray, J., who tried the action, held that the remedy of recovery given by s. 2 of the Act (R.S.O. 217, s. 3) was not confined to a case where the payment had been made to an indorsee

for value without notice, but applied where payment had been made to any indorsee, and that the plaintiff was therefore entitled to judgment.

SALE OF GOODS—PASSING OF PROPERTY—PURCHASER FRAUDULENTLY PERSONATING ANOTHER PERSON—SUBSEQUENT TRANSFEREE FOR VALUE WITHOUT NOTICE.

Phillips v. *Brooks* (1919) 2 K.B. 243. This was an action by the plaintiffs, who were jewellers, to recover from the defendants, who were pawnbrokers, a valuable ring, in the following circumstances: A man named North, who represented himself to be Sir George Bullough, purchased some jewellery from the plaintiffs, including the ring in question. This he was allowed to take away with him on his tendering a cheque (which proved worthless), on the faith of his being the person he represented himself to be. This ring he subsequently pawned with the defendants who, *bonâ fide* and without notice of the fraud on the plaintiffs, lent £350 on it. The plaintiffs claimed that they had no intention of selling or parting with the ring to North. Horridge, J., who tried the action, came to the conclusion that the plaintiffs did as a matter of fact sell the ring to North, although they would not so have sold it to him, but for his misrepresentation as to who he was; he therefore found as a matter of law that the property in the ring passed to North and it was not the case of a thief selling stolen property. He therefore held that the defendants had acquired a good title to the ring, and dismissed the action.

PRIZE COURT—NEUTRAL VESSEL—"FLEET AUXILIARY" UNNEUTRAL SERVICE—TRANSFER AFTER OUTBREAK OF WAR—BONA FIDE TRANSFEREE—DECLARATION OF LONDON, 1909, ART. 56.

The Edna (1919) P. 157. The vessel in question in this action was at the outbreak of the war registered as a Mexican vessel and nominally owned by a Mexican company, but actually owned and controlled by a German subject, and was flying the German flag in order to avoid being requisitioned by either of the contending factions in Mexico. On her next voyage, which began August 23, 1914, she sailed under the Mexican flag with coal and other goods intended for the German cruiser "Leipzig," and eventually the coal after being put in lighters was delivered to the "Leipzig." The vessel was then requisitioned for over twelve months first by the followers of Carranza and subsequently by the followers of Villa, and was eventually sold *bonâ fide* to the claim-

ants, a San Francisco firm. In January, 1916, she was captured by a British cruiser, and her condemnation was claimed *inter alia* on the ground that the sale was invalid and that she having acted as an auxiliary to the "Leipzig" must be regarded as an enemy vessel. The Declaration of London, 1909, art. 56, provides "the transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void, unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed. Lord Sterndale, P.P.D., held that, assuming the vessel to have been an enemy vessel at the outbreak of the war, the claimants had established that the transfer to them was *bonâ fide* and not with the object of avoiding the consequences to which, as an enemy vessel, it was exposed. He also held that although a belligerent ship of war could not be transferred to a neutral during war time, the vessel could not be regarded as an auxiliary to the German navy by reason of her having shipped coal to be delivered to the "Leipzig." He therefore ordered her release.

WILL—CONSTRUCTION—GIFT TO SUCH PERSONS AS, ON FAILURE OF PRECEDING TRUSTS, SHALL BE "MY NEXT OF KIN AND ENTITLED TO MY PERSONAL ESTATE UNDER THE STATUTES OF DISTRIBUTION"—TIME FOR ASCERTAINING CLASS.

In re Hutchinson, Carter v. *Hutchinson* (1919) 2 Ch. 17. In this case a will was in question, whereby the testator after giving his wife a life interest in the whole of his estate gave his residue in trust for his three daughters and their respective children in equal shares with cross limitations which had the effect of preventing the failure of the trusts until all three daughters had died without issue, and he then directed "that on failure of all the trusts hereinbefore declared of the residue of my personal estate, such residue shall be in trust for such persons as on the failure of such trusts shall be my next of kin and entitled to my personal estate under the statutes for the distribution of the personal estates of intestates, such persons if more than one to take distributively according to such statutes." All the daughters having died without issue, the question arose whether the next of kin were to be ascertained as at the date of the testator's death or at the date of the last surviving daughter. Lawrence, J., held that the persons to take must be ascertained as at the death of the testator: and the Court of Appeal (Eady, M.R., and Scrutton, L.J., and Eve, J.) affirmed his decision.

ADMINISTRATION—ACCOUNT—ACTION BY BENEFICIARY—REAL PROPERTY LIMITATION ACT, 1874 (37 & 38 VICT. c. 57), s. 8—TRUSTEE ACT, 1888 (51-52 VICT. c. 59), s. 8 (1) (*a*) (*b*)—(R.S.O. c. 75, ss. 24, 47 (2) (*a*) (*b*)).

In re Richardson, Pole v. *Pattenden* (1919) 2 Ch. 50. This was an action for administration in the following circumstances: A testator who died in 1909, subject to payment of debts and legacies, left all his residue to his widow absolutely. He appointed the widow and the defendant in the present action his executors. The estate was administered and the functions of the executors came to an end in 1910, certain of the testator's property remaining by arrangement in the joint names of the widow and the defendant. The widow died in 1917, and the plaintiffs were beneficiaries under her will, the defendant being one of the executors of her will. The action was for the administration of the estate of the original testator. The defendant claimed the protection of the Trustee Act, 1888, s. 8 (1), (R.S.O. c. 75, s. 24 (1)). Peterson J., who heard the application, held that the action was to recover a legacy, and therefore s. 8 of the Real Property Limitation Act, 1874, applied (R.S.O. c. 75, s. 24), and as there was a subsisting Statute of Limitations applicable to the case, s. 8 (1) (*b*), of the Trustee Act, 1888 (R.S.O. c. 75, s. 47 (2) (*b*), did not apply; but he held that s. 8 (1) (*a*), (R.S.O. c. 75, s. 47 (2) (*a*)), applied to an action against an executor for an account, and therefore that the claim for an account was barred by the lapse of six years; but because it could not be ascertained without an account whether or not the defendant had any of the property of the original testator in his hands, he directed the usual accounts to be taken against the defendant as executor, leaving the question which items are barred by the Act of 1888 (R.S.O. c. 75, s. 47), to be dealt with after the facts had been ascertained.

PATENT ACTION—INFRINGEMENT—PARTICULARS OF ALLEGED INFRINGEMENT—DISCOVERY.

Aktiengesselschaft etc. v. *London Aluminium Co.* (1919) 2 Ch. 67. This was an action for the infringement of a patent, and the question determined is in regard to the extent to which the plaintiffs were entitled to discovery, and though the case turns to some extent on special rules of practice governing such cases, the principle involved is deserving of attention. By the English Rules in patent actions the plaintiff is required to deliver with his statement of claim particulars of the alleged infringements. In the interrogatories for discovery the plaintiffs asked questions of a roving or fishing character with a view to finding out generally whether

the defendants had committed any and what infringements: this the Court of Appeal (Eady, M.R., and Warrington, L.J.) held could not be done before judgment, and that discovery must be confined to the particular infringements alleged in the plaintiffs' particulars; in short, that before judgment discovery must be limited to issues raised in the action.

TRUST DEED—REMUNERATION OF TRUSTEES—CONTRACT—CONSTRUCTION—APPOINTMENT OF RECEIVER OF TRUST PROPERTY—RIGHT OF TRUSTEES TO REMUNERATION AFTER RECEIVER'S APPOINTMENT.

In re British Consolidated Oil Corporation, Howell v. *The Company* (1919) 2 Ch. 81. By a trust deed made to secure second debenture stock issued by a company, it was provided that the trustees should be paid a specified remuneration in each year during the continuance of the trust. The company got into pecuniary difficulties and a receiver was appointed at the instance of the first debenture stock holders: the question to be determined was whether or not the trustees for the second debenture stock holders were entitled to their remuneration after the appointment of the receiver. Peterson, J., answered that question in the affirmative, he being of the opinion that, according to the true construction of the trust deed, the trustees were entitled to the remuneration specified, irrespective of what duties might actually be performed by them in any particular year, so long as the trust subsisted.

WILL—SALE OF TESTATOR'S BUSINESS—PURCHASE MONEY PAYABLE BY INSTALMENTS—APPORTIONMENT—TENANT FOR LIFE AND REMAINDERMAN.

In re Hollebone, Hollebone v. *Hollebone* (1919) 2 Ch. 93. In this case the trustees of the will of a testator had sold his business, the price for which was payable by instalments, and the question to be solved was how these instalments were to be apportioned as between a tenant for life and the remainderman. Eve, J., who heard the application, decided that the instalments must be apportioned between corpus and income by ascertaining the sum which put out at interest at 4% per annum on the day of the testator's death, and accumulating at compound interest calculated at that rate with yearly rests, and deducting income tax, would amount on the day the instalment was or shall be received to the amount received, including interest, if any; and the sum so ascertained must be treated as capital and the difference between it and the sum actually received, as income.

WILL—CONSTRUCTION—OPTION TO RESIDE IN FURNISHED HOUSE—EXERCISE OF OPTION—RESIDENCE FOR LIFE ON CONDITIONS—POWERS OF TENANT FOR LIFE—SETTLED LAND ACT, 1882 (45-46 VICT. c. 38), s. 51—(R.S.O. c. 74, s. 33).

In re Gibbons, Gibbons v. *Gibbons* (1919) 2 Ch. 99. By the testator's will which was in question in this case, after providing for the upkeep of his house, grounds and furniture as a residence for his family until the youngest of his children came of age, the testator gave to his eldest son as that event happened the option of occupying and enjoying the use of this house and furniture during his life, without payment of rent, but subject to his paying taxes, outgoings and keeping the premises insured and repaired; such option to be exercised by written notice to the trustees within three months from the time the right to exercise it arose. Subject to this, similar rights were given in succession to the testator's other two children, and there was an ultimate gift of the residue to the trustees in trust for his three children. The testator's youngest son attained 21 in January, 1913, and the eldest son then gave due notice of exercise of the option and went into possession and resided in the house until 1916, when he let it unfurnished for fourteen years and removed the furniture. The daughter of the testator, a residuary legatee, claimed that, by ceasing to reside in the house, the eldest son's rights under the option ceased, and both the house and furniture fell into the residue: and Eve, J., so held: although it seems to have been conceded that while in possession the eldest son had the powers of a tenant for life and was competent as such to make the lease he did. See R.S.O. c. 74, s. 33.

GIFT INTER VIVOS—ABSOLUTE ASSIGNMENT IN WRITING—MONEY ON DEPOSIT AT BANK—DELIVERY—RETENTION BY DONOR OF INDICIA OF TITLE—AUTHORITY TO BANK TO PAY—LEGAL CHOSE IN ACTION—JUDICATURE ACT, 1873 (36-37 VICT. c. 66), s. 25 (6)—(R.S.O. c. 109, s. 49).

In re Westerton, Public Trustee v. *Gray* (1919) 2 Ch. 104. The question in this case was whether a valid gift *inter vivos* had been made by a deceased testator of certain money deposited in a bank, and which so remained up to the time of his death in 1917. It appeared that the money in question was deposited by the testator in 1914, and for which he held a receipt. The testator had been in the habit of lodging with a Mrs. Gray for a few weeks in each year, and from December, 1913, until his death he had permanently lodged with her, and he appeared grateful for her attention to his comfort, and for her assistance in nursing him in illness. In the early part of 1916 he called her into his bedroom and handed her

an envelope addressed to her, and said, "Here's a present for you, Mrs. Gray; that is for you. I have given it into your hand." She took the envelope from him and said, "I will see what is inside," and was about to open it when he took it from her hand and said, "Remember I will keep it for you." She accordingly returned it to him and he put it in his despatch box. He then said, "Remember I'll keep it for you." She said, "Yes, keep it for me, I shan't miss anything, if it is like the old rubbish you generally give me." He replied, "Rubbish is it? It's worth £500." On his death the envelope was found in his despatch box containing the deposit receipts and a letter addressed to Mrs. Gray, dated in 1916, saying "You have been very kind to me and I desire to make some return by giving you the amount of £500 now on deposit in the London County and Westminster Bank as per receipt enclosed." There was also an order signed by the testator directing the bank to pay Mrs. Gray the money. Sargant, J., who heard the application, held that this constituted a valid assignment of the chose in action within the Judicature Act, s. 25 (6)—(see R.S.O. c. 109, s. 49), which enabled the assignee to sue in her own name at law, and therefore the absence of consideration, which might previously in equity have been fatal to the right of the assignee to recover, was no longer an obstacle.

COMPANY—WINDING-UP—PREFERENCE SHARES—PRIORITY AS TO CAPITAL—SURPLUS ASSETS—COMPANIES CONSOLIDATION ACT (1908) 8 EDW. VII. c. 69, s. 186.

In re Fraser & Chalmers (1919) 2 Ch. 114. This was a winding up proceeding and the simple question to be decided was whether preference shareholders were entitled to share with common shareholders in the surplus assets of the company. *In re National Telephone Co.* (1914) 1 Ch. 755 (noted *ante* vol. 50, p. 392). Sargant, J., held that the preferential rights accorded to preference shareholders on the creation of their shares, either with regard to the payment of dividends, or return of capital, is *primâ facie* a definition of the whole of their rights, and as the articles of association in that case expressly provided that the preference shareholders were not to share in the surplus assets, he disallowed the claim; but he went on to say that he thought the attachment of preferential rights to preference shares was *primâ facie* a definition of the whole of their rights; and negatived any further or other right to which, but for the specified rights, they would be entitled. This, Astbury, J., considered not to be a correct statement of the law, and in the present case where there was no express provision

excluding preference shareholders from participating in the surplus, he held them entitled to share therein with the ordinary shareholders.

RESTRAINT OF TRADE—CO-OPERATIVE SOCIETY—RULES RESTRICTING TRADE BY MEMBERS OF SOCIETY—ULTRA VIRES—MEMBERS DISPUTING VALIDITY OF RULES—ARBITRATION CLAUSE—ACTION IMPEACHING RULES.

McEllistrim v. *Ballymacelligott Co-operative Society* (1919) A.C. 548. This was an appeal to the House of Lords from the Irish Court of Appeal. The action was brought by a member of an incorporated co-operative society impeaching certain rules of the society as being in restraint of trade. The society was formed for carrying on the manufacture of butter and cheese from milk to be supplied by its members. The objectionable rules provided that no number should, without the consent of the society, sell milk or cream within a considerable area, extending to eighty townships, to any other company, person, or society. They also provided that a member could not withdraw from the society without its consent. The rules also contained an arbitration clause in cases of disputes between the society and its members. The defendants sought to stay the action on the ground that it was a dispute between a member and the society, and therefore within the arbitration clause, but this motion was refused in the Court below and as the House of Lords (Lord Birkenhead, L.C., and Lords Finlay, Atkinson, Shaw and Parmoor) held rightly so, on the ground that a contention that the rules of the society were *ultra vires* was not a dispute between a member and the society within the meaning of the arbitration clause. At the trial Barton, J., held that the rules were in undue restraint of trade and gave judgment in favour of the plaintiff, but this was subsequently reversed by the Irish Court of Appeal (Sir I. J. O'Brien, L.C., and Ronan and Maloney, L.JJ.). The House of Lords have now reversed the latter judgment and restored that of Barton, J., because for an indefinite time members were restrained from selling cream or milk except to the society; because they were restrained from withdrawing from the society without its consent: and although it was conceded that the society was entitled to impose some restraint on sales by its members, yet it was considered that the combined effect of the rules above referred to were in excess of what was reasonably necessary, and were therefore *ultra vires* of the society.

STOCK EXCHANGE—MEMBER—RE-ELECTION—NATURALIZED BRITISH SUBJECT—OBJECTION OF ENEMY BIRTH—DISCRETION OF COMMITTEE.

Weinberger v. *Inglis* (1919) A.C. 606. This was an appeal to the House of Lords (Lord Birkenhead, L.C., and Lords Buckmaster, Atkinson, Parmoor and Wrenbury) from the decision of the Court of Appeal (1918) 1 Ch. 517. By the rules of the London Stock Exchange members have to be annually re-elected by a committee; the plaintiff who was of enemy birth; but a naturalized British subject, applied for re-election. His re-election was objected to on the ground of his enemy birth; he was called on and heard in answer to the objection, and after due consideration the committee refused to re-elect him. Of 107 members of enemy birth it appeared 50 were re-elected and 57 rejected. The plaintiff complained that in his case the committee had acted arbitrarily and capriciously, but the Court below thought that the committee had *bonâ fide* exercised its discretion, and that there was therefore no jurisdiction to interfere with its decision, and the House of Lords was of the like opinion.

EXPROPRIATION OF LAND FOR PUBLIC PURPOSES—OBJECTION BY OWNER THAT HIS LAND IS NOT NEEDED FOR PUBLIC PURPOSES.

Wijeyesekera v. *Festing* (1919) A.C. 646. This was an appeal from the Supreme Court of Ceylon, but the point decided is of general application. It is in effect this: that where under a statute appropriate proceedings are taken for the expropriation of land for public purposes, it is not open to the owner of the land in question to contend in any Court that it is not needed for public purposes.

BANKER—DRAFTS BY AGENT—CREDITING AMOUNT OF DRAFTS TO AGENT'S PRIVATE ACCOUNT—MISAPPLICATION OF TRUST FUND —MEASURE OF LIABILITY.

British America Elevator Co. v. *Bank of British North America* (1919) A.C. 658. This was an appeal from the Court of Appeal of Manitoba. The action was brought by the plaintiffs against the bank to recover moneys of the plaintiffs misapplied in the following circumstances: The plaintiffs were dealers in grain, and they had a purchasing agent named Youngberg at a place called Waldheim; his duty was to buy grain from farmers and give them tickets for the prices; these tickets on presentation were to be paid in currency. In order to enable Youngberg to meet these payments the plaintiffs arranged with the bank to furnish the necessary currency at a

specified commission. Youngberg had a private account and also a firm account at the Rosthern branch of the defendant bank, from which the currency was to be furnished; these accounts were frequently overdrawn, and the bank's agent, knowing the purpose for which the currency was to be furnished for the plaintiffs, placed the amount of several drafts drawn by Youngberg on the plaintiffs to the credit of Youngberg's private, or firm, account with the result that the money was misapplied. Galt, J., who tried the action, held that the bank was liable for all sums so placed to Youngberg's private or firm accounts. The Court of Appeal directed a reference to ascertain what damage the plaintiffs had actually sustained by the bank's action, but the Judicial Committee of the Privy Council (Lords Haldane, Finlay and Phillimore) have restored the judgment of Galt, J., their Lordships being of the opinion that the Court of Appeal should have treated the claim as one for the replacement of trust funds and not for damages. Their Lordships intimate that perhaps the bank might be entitled to some relief in possible proceedings against the present plaintiffs and Youngberg, to which Youngberg's assignee in insolvency might be a necessary party, but that on the present record no such relief could be given.

ALBERTA — TAXATION — SUCCESSION DUTY — REGISTERED MORTGAGE—PROPERTY IN PROVINCE—SUCCESSION DUTIES ACT, 1914 (5 GEO. V. c. 5, ALTA.), s. 7.

Toronto General Trusts Corp. v. *The King* (1919) A.C. 679. This was an action by the Crown in the Province of Alberta to recover succession duties in respect of a certain mortgage registered in that Province and owned by a deceased person at the time of his death in the Province of Ontario, where he had his domicile. The representatives of the deceased claimed that the mortgage debts were not property within the Province of Alberta, and that the situs of a specialty debt was where the document evidencing the debt happened to be, which they claimed was the Province of Ontario. The Judicial Committee of the Privy Council (Lords Haldane, Finlay, Cave, Dunedin, and Shaw) however, affirmed the judgment of the Supreme Court of Canada in favour of the plaintiff and held that, when a mortgage is made in duplicate, and one of the duplicates is registered in one Province and the other is found at the mortgagee's death in another Province, the situs of the debt cannot be properly said to be in both Provinces, but must rather be deemed to be in that Province according to whose laws the mortgage was created and by which laws also it would have to be enforced.

CANADA—ACTION COMMENCED WITHOUT CONSENT OF ATTORNEY-GENERAL REQUIRED BY STATUTE—SUMMARY DISMISSAL OF ACTION—ULTRA VIRES—ONT. RULE 124—R.S.O. c. 39, s. 16.

Electrical Development Co. v. *Attorney-General (Ont.)* (1919) A.C. 687. This was an appeal from an order of the Appellate Division of the S.C.O., 38 O.L.R. 383, affirming an order of Middleton, J., dismissing an appeal from an order made by the Master in Chambers dismissing the action summarily before the filing of a statement of claim on the ground that the writ was improperly issued, the action having been commenced without the consent of the Attorney-General as required by R.S.O. c. 39, s. 16. The Judicial Committee of the Privy Council (Lords Haldane, Finlay, Cave, Shaw, and Phillimore) allowed the appeal, being of the opinion that the question proposed to be raised in the action ought not to be summarily dealt with, and that the action should be suffered to proceed to trial and to be there dealt with in the ordinary way. Their Lordships express no opinion on the merits of the case.

Bench and Bar.

CANADIAN BAR ASSOCIATION.

We are informed that His Royal Highness the Prince of Wales, on his recent visit to Winnipeg, at the request of Sir James Aikens, President of the Association, has graciously accepted honorary membership in the Association.

The President, with his constant attention to the welfare of the Association, has recently visited British Columbia in connection therewith. On November 4th he was entertained at dinner by the Vancouver Bar Association and on November 6th by the Victoria Bar Association. On both occasions Sir James addressed the members of the Bar dealing with the objects of the C.B.A. and outlining the work which has already been accomplished. Very keen interest in the Association was manifested by the members of the Bar both at Vancouver and Victoria and active steps are being taken to develop the organization to a greater degree in British Columbia. Mr. L. G. McPhillips, K.C., of Vancouver, is Vice-President for British Columbia, and Mr. Clarence Darling, of Vancouver, is Secretary for the Council in that Province.

The Deputy Attorney-General for Ontario.

It is our pleasure to record the appointment of Mr. Edward Bayly, K.C., as Deputy Attorney-General for Ontario. The Psalmist, many years ago, said: "Promotion cometh neither from the east nor from the west, nor yet from the south." In this case it came from the north, namely, from the late Premier, who himself failed to return from his erstwhile northern fastness. The appointment of Mr. Bayly will meet with general approbation from those whose opinion is of value. His promotion from the position of Solicitor to the Attorney-General's Department was expected by those who knew the quiet but tenacious force behind the actions of that Department during recent regimes; and moreover it is the right thing to promote an official if competent. To a sound knowledge of those branches of the law with which he is immediately concerned, Mr. Bayly adds a capacity to rapidly grasp the salient points of matters which come before him; no small advantage to those having dealings with that Department. We wish him continued success.

Lord Halsbury.

There may be a difference of opinion as to whether Lord Halsbury looks so old as he actually is, but most certainly his movements and interests are quite exceptional for one who has reached his ninety-fourth year. His Lordship celebrated his birthday last week, and many and hearty were the congratulations that reached him from men of all complexions in political life, and from a wide circle of Christian friends. In all his affairs, political, social and intellectual—his Lordship is a Christian of decided faith, and a worthy standard-bearer among trusty stalwarts of the Gospel.—*Ex.*

Judicial Appointments.

Hon. R. A. E. Greenshields, Judge of the Superior Court of the Province of Quebec, to be a Puisne Judge of the Court of King's Bench in said Province, vice Mr. Justice Cross, deceased (Sept. 26).

E. E. Howard, of Montreal, K.C., to be Puisne Judge of the Superior Court of Quebec, vice Mr. Justice Greenshields (Sept. 26).

Harold E. Maulson, K.C., of Minnedosa, Manitoba, to be Judge of the County Court of the Northern Judicial District of the Province of Manitoba, vice Judge Mickle, retired. (Oct. 10.)

James Murdock, of the City of Toronto, to be a member of the Board of Commerce, vice F. A. Acland, resigned. (Sept. 30.)

His Hon. J. J. Coughlin, Junior Judge of the County Court of the County of Kent, Ontario, to be Judge of the County Court of the County of Essex, Ontario, vice Judge Dromgole, deceased. (Sept. 29.)

His Hon. R. D. Gunn, Junior Judge of the County Court of the County of Carleton, Ontario, to be Judge thereof, vice Judge McTavish, deceased. (Sept. 30.)

His Hon. C. H. Widdifield, Junior Judge of the County Court of the County of Grey, Ontario, to be third Junior Judge of the County of York, Ontario, vice Judge Denton, appointed Junior Judge thereof. (Sept. 30.)

His Hon. E. J. Hearn, Junior Judge of the County Court of the County of Waterloo, Ontario, to be Judge thereof. vice Judge Reade, deceased. (Sept. 30.)

Lt.-Col. J.D.R. Stewart of the City of Calgary, Alberta, Barrister at law to be Judge of the District of Acadia in the said Province (Nov. 15).

Flotsam and Jetsam.

High Wages and the Legal Profession.

At the present time workers at trades requiring but moderate intelligence and skill are receiving remuneration exceeding that of the average young lawyer. Just what effect is this going to have on the future of the legal profession? The average healthy young man of eighteen can see how with a few months' preparation for a trade he can become the recipient of a "union scale" wage of thirty or forty dollars a week. Four years in college, three in a law school and two or three starvation years waiting ethically for clients may bring him an equal income at the bar. Will not a great many "take the cash and let the credit go"? There is of course the feeling which makes a man prefer a ten dollar "position" to a thirty dollar "job," but it is steadily weakening under the pressure of increasing prices. Talk with the young men of this generation discloses an increasing tendency to regard education as of little value in the struggle for

success. If this condition persists it will mean that the legal profession will in the future be recruited largely from the sons of the wealthy, a condition far from desirable, and one which tends rapidly to the establishment of a caste system. The solution of the problem, if problem there be, is somewhat difficult. It is not to be found in the reduction of wages or in the increase of fees. It lies rather, as does the solution of many of our problems, in the cultivation of an ideal; in the increase of the belief that learning is worth while for its own sake, that service and not acquisition is the law of life, and that professional position is worth effort and sacrifice not for its financial rewards but for the unequalled opportunity which it offers to serve the common good. When the man who maintains the nation's justice in peace receives something of the honor paid to him who maintains its honor in war the bar will never lack for worthy candidates, however poor its financial reward may be.—*Law Notes.*

Confidential Communications.

The present state of the law with respect to the communications which are privileged from disclosure on the witness stand is not wholly logical. The rule of privilege rests wholly on public policy, and the doctrine is that the public welfare requires that a man shall be able in confidence to talk with his wife and to seek legal, medical and spiritual counsel. The theory seems a sound one, despite the vigorous effort of Mr. Wigmore to minimize it in some respects, but if it is to be admitted, there are other occasions of confidence which stand in like reasons. If a man confesses his sins to a priest, the communication is privileged, but if he follows the divine injunction to go into his closet and shut the door and pray to his Father which is in secret, a listener outside the closet door may repeat the prayer in court. *Woolfolk* v. *State,* 85 Ga. 69. Some of the great fraternal Orders play a large part in our social organization and establish for many men not only the most confidential personal relation but the most potent religious influence in their lives. Certainly public policy requires the maintenance of that fraternal tie, yet it has been held that a communication made in reliance on the Masonic obligation is not privileged. *Owens* v. *Frank,* 7 Wyo. 467. A striking illustration of the denial of a privilege which is demanded by every consideration of reason is found in the case of *Lindsey* v. *People,* 181 Pac. 531 (abstracted elsewhere in this issue), wherein it was held by a divided court that Judge Lindsey

of the Juvenile Court of Denver could be compelled to testify to disclosures made to him in confidence by a juvenile delinquent under his jurisdiction. It is hard to imagine a requirement of public policy more stringent than that which protects and promotes the work of a well conducted juvenile court. It is hard to imagine a relation more confidential than that between Judge Lindsey and the boys whom he is seeking to rehabilitate or one that is used for nobler ends. That a communication made in the confidence of that relation should not be privileged, while those of a profiteering merchant seeking to learn from his attorney how far he can gouge the public without getting into jail are privileged, may be law but it certainly is not justice. If it is conceded that any communication is to be privileged from the demands of a legal inquiry it is time that the privilege should be extended to other relations produced by modern civilization which stand on the same footing in point of reason as those now recognized. The commitment of the entire matter, including privileges now legislatively established, to judicial discretion, might be the ideal solution, but it is probably useless to expect any Legislature to shew that much confidence in the judges on whose intelligence and integrity the entire administration of justice depends.—*Law Notes.*

Wills of Property Abroad.

Practitioners are occasionally told, when instructed to prepare wills, that the testator has some land in a British colony, or elsewhere abroad, and that he wishes to dispose of it in common with his property in England. When that is the case it becomes necessary to consider the law of the country in which the property is situated, and more particularly the manner of executing and attesting wills of property there. As a rule, there is no great difficulty in ascertaining this from text books, such as Jarman on Wills, 5th ed., vol. 2, Appendix A, where there is a very useful summary of the law on the subject, or from the statutes of the colony. The English Wills Act (1 Vict. c. 26), as regards the execution and attestation of wills, has been adopted in most of the colonies and dependencies of this country, including the Australian settlements, Upper Canada, India, Barbados, Jamaica. If, however, the property abroad is considerable, and there is any serious doubt as to the law applicable, it is advisable that the will should be settled by a person acquainted with the law of the place in which it is situate. It is sometimes suggested that there should

be two wills, one of the property abroad, and the other of the property here, but that course is not recommended, if it can be avoided, as it may lead to difficulties. It is hardly necessary to point out that, if two wills are resorted to, care must be taken that their provisions are not cumulative, unless of course so intended. In simple cases it is thought that it is better to include the property abroad in the devise of the property in England, and to insert power to the trustees or executors in England to appoint agents to act with regard to the property abroad: (see forms for that purpose in Key and Elphinstone's Precedents, 10th ed. vol. 2, p. 931).—*Law Times.*

Instructions for Wills.

How far a solicitor, when taking instructions for a will, should make suggestions to a testator as to the mode of disposing of his property is a question not free from difficulty. Testators are apt to resent any interference with their testamentary intentions. As, however, but few laymen can know enough of the technicalities of English law to keep them straight in the matter of will-making, it is submitted that a solicitor is quite justified in pointing out to a testator the possible effect of his dispositions in certain contingencies which may not have occurred to him; and if any of such dispositions infringe any rule of law, of course it must be pointed out to him. There are three obvious points on which testators may unintentionally go wrong. Owing to the doctrine of ademption, that is, the rule that a specific gift is adeemed, or revoked, if at the testator's death the thing given has been destroyed by the act of God, or converted into something else by the act of the testator, or by duly constituted authority: (Theobald on Wills, 7th ed., p 164). This not infrequently happens with regard to bequests of stocks, shares, and securities which are changed in the lifetime of the testator, after the date of his will. It is not possible to lay down any hard-and-fast rule as to what amount of change is necessary to cause ademption. If, therefore, a testator intends to benefit a legatee by bequeathing to him stocks, shares, or securities of a particular denomination, held by the testator, he should consider the possibility of the same being adeemed, and, if so minded, he should provide against it by substituting in that event a general legacy for a specific one. Another point upon which testators require guidance is as to income during the first year after their death. As a rule, legacies do not carry interest till the expiration of one year after the death of the testator; and in the case of gifts of residue the income of it is not likely to be available for some

months after death. Therefore, if a testator intends it, he should make some provision for the period which will elapse before the income becomes available, particularly in the case of a provision for his widow. The third point to be considered is whether a legacy should be given to the executors for their trouble. Unless they are near relatives, they are apt to renounce probate if no legacy is left to them.—*Law Times.*

A Purchaser's Costs.

The vendor has the advantage over the purchaser that he, when the sale is by auction, can insert conditions which the purchaser, if he is anxious to buy the property, must accept, and when the sale is by private contract can, at any rate, suggest them. Consequently, many of the conditions which are to the disadvantage of the purchaser were generally inserted in conditions of sale or contracts for sale. One great object of the Conveyancing Act, 1881, was to shorten documents and to imply what was generally expressed in them. Sec. 3 (6) of that Act accordingly throws on to the purchaser the cost of many things which we should naturally expect the vendor to bear, with the result, at any rate, that the purchaser frequently waives what he would have required, if the costs had been thrown on to his vendor. The vendor must furnish a complete abstract of all documents from the commencement of title (*Re Stamford Banking Company and Knight's Contract*, 81 L.T. Rep. 708; (1900) 1 Ch. 287), even though they are not in his possession: (*Re Johnson and Tustin*, 53 L.T. Rep. 281, 30 Ch. Div. 42). So that, if he is a sub-vendor, he must abstract the contract which he made with the original vendor: (*Hucklesby and Atkinson's Contract*, 102 L.T. Rep. 214). He should state the facts of heirship in the abstract: (*Re O'Conlon and Faulkener's Contract*, (1916), 1 I.R. 241). Proof of the statements in the abstract has to be paid for by the purchaser. Thus, he has to pay for statutory declarations (*Re Judge and Sheridan's Contract*, 96 L.T.R. p. 451), for proving the heirship (*Re O'Conlon and Faulkener's Contract, sup.*), and, as Mr. Justice Astbury has just decided, for proving that his vendor was a mortgagee in possession before the coming into operation of the Courts (Emergency Powers) Act, 1914: (*Re Wright and Thompson's Contract*, noted *ante*, p. 114). To the list of those things which are enumerated in Wolstenholme's Conveyancing Acts, 10th ed., p. 27, as "cases not within this sub-section," since they are part of the title rather than proof of it, should be added proof of payment of estate and succession duties, or of their not being payable: (*Re O'Conlon and Faulkener's Contract, sup.*).—*Law Times.*

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THE LAW OF DIVORCE IN CANADA.

It is desirable that this most important branch of law should be thoroughly understood by the profession in view of the probability of its being the subject of legislation at an early date. With this in view we publish in this issue the report of the case of *Walker* v. *Walker* (see *post* p. 385), and an annotation thereon taken from the Dominion Law Reports; we reproduce also an article from the *Law Times* (Eng.), which calls attention to the obvious need of their being uniformity, if possible or as far as possible, in the law both as to marriage and divorce in the various Provinces of the Dominion.

Our readers will understand from this material that Ontario and Quebec are the only two Provinces in Canada without provision for judicial divorce, thus differing from the other Provinces.

The Courts in Ontario have consistently held that they have no jurisdiction to entertain divorce pleas, although in the early case of *Beatty* v. *Butler* (see Gemmill, at p. 40) the jurisdiction was exercised in a case when the marriage was void *ab initio*. In *Lawless* v. *Chamberlain* (1889), 18 O.R. 296, Boyd, C., likewise held that the High Court of Justice in Ontario had jurisdiction to declare the nullity of a marriage which was void *ab initio* because it had been procured by fraud or duress. This would appear to be consistent with the judgment of Hyndman, J., of the Supreme Court of Alberta, in *Cox* v. *Cox* (1918), 40 D.L.R. 195.

Where however it was endeavoured to get the Ontario Courts to adjudicate *in rem* to dissolve the existing marital union, the Ontario Judges have held that no jurisdiction exists in their Courts. The following cases may be referred to in this connection:—

T. v. *B.* (1907), 15 O.L.R. 224; *Menzies* v. *Farnon* (1909), 18 O.L.R. 174; *May* v. *May* (1910), 22 O.L.R. 559; *A.* v. *B.* (1911),

23 O.L.R. 261; *Leakim* v. *Leakim* (1912), 3 O.W.N. 994; *Malot* v. *Malot* (1913), 4 O.W.N. 1577; *Prowd* v. *Spence* (1913), 10 D.L.R. 215; *Langworthy* v. *McVicar* (1914), 5 O.W.N. 767; *Hallman* v. *Hallman* (1914), 5 O.W.N. 976; *Reid* v. *Aull* (1914), 32 O.L.R. 68.

In Upper Canada (now Ontario) the laws of England of October 15, 1792, were introduced. This would not include the English Act of 1857, which enacted new substantive law and transferred cases of divorce and matrimonial causes to the newly-created Divorce Court. Hence when Upper Canada entered confederation it did not bring with it any substantive law as to divorce. Since Confederation the Dominion Parliament has as before mentioned enacted no general law as to divorce and hence it would appear that in Ontario to-day there is no substantive law in force.

If some substantive law is hereafter enacted by the Dominion Parliament for the Province of Ontario and no provision is made for the administration of same then it would seem to follow from the *Walker* and *Board* cases that the Supreme Court of that Province must adjudicate as to pleas filed under such law.

The old fashioned forum for the trial of divorce cases in this country, a Committee of the Senate of the Dominion, is entirely inadequate, unsuitable, and inconvenient, and is so expensive as to remind one of the well known sarcastic remarks of Mr. Justice Maule, when passing sentence on a man convicted of bigamy, in which he calls attention in a humorous and sarcastic manner to the hardship to which a poor man or woman is subject in seeking relief from the matrimonial tie. This unfortunate prisoner had taken to himself a wife to replace one who had deserted him, without previously obtaining a divorce, which the Judge said might have cost him the impossible sum of a thousand pounds or so. The Judge concluded his remarks as follows: "You will probably tell me that you never had a thousand farthings of your own in the world; but, prisoner, that makes no difference. Sitting here as a British Judge, it is my duty to tell you that this is not a country in which there is one law for the rich, and another for the poor."

If this jurisdiction goes from the Senate to the Courts, in Ontario and Quebec, the staffs that will have charge of these

cases will have to be materially increased as well as the number of Judges. It is a deplorable business, this clamor of the young people of this age to be freed from bonds which they hastily took upon themselves, and do not hesitate to break. Probably, however, if the Senate gets rid of these cases, applications may become fewer when they come to the Courts. There have been applications granted by the Senate which would never have been entertained by the Courts, such as cases in which the uncoroborated testimony of one witness had been held sufficient to make an order, ignoring the opportunity that such a departure from the ordinary rules of evidence affords for fraud and collusion.

The article referred to reads as follows:—

'There is at present a complete lack of, and an urgent need for uniformity in marriage and divorce law throughout the Empire. This receives apt illustration from the circumstance that the Matrimonial Causes Act, 1857, is not in force in Ireland, many Provinces of Canada, many West Indian islands and other Crown colonies, etc. The Dominion (in its geographical sense) of Canada is particularly an object lesson in this respect, and two appeals to the Privy Council have recently been concluded in which it has at length been finally settled that the provincial Courts in Manitoba and Alberta have the same powers of granting divorce as were conferred on the "Court for Divorce and Matrimonial Causes" in England by the Matrimonial Causes Act, 1857: (see *Walker* v. *Walker* and *Board* v. *Board* (1919), W.N. 204).

The position in Canada is extraordinary. By sec. 91 of the British North America Act, 1867, divorce is one of the matters on which the Dominion Legislature has exclusive jurisdiction, and the Provincial Legislatures have no power to pass statutes dealing with divorce. Up to the present time, however, no general Dominion legislation on this subject has taken place, though indirectly divorce jurisdiction has been conferred on some of the provincial Courts. Among the Provinces there are three phases of the question as to the jurisdiction of provincial Courts to entertain and make decrees in divorce proceedings. The cases of Ontario, British Columbia, and Manitoba respectively may be

taken as typical, though each one of the Provinces presents points of peculiarity.

In Ontario, the local jurisprudence is based on the law of England as it stood in 1792, and no statute, provincial, Dominion, or Imperial, appears to have been enacted giving any jurisdiction to Ontario Courts to entertain divorce proceedings. In Ontario accordingly divorce by judical decree cannot be had.

British Columbia did not become a Province in the Dominion of Canada until 1871. Prior to this, provision had been made by two successive local enactments for English law as it stood on the 19th Nov., 1858, being in force in British Columbia. The latter of these (the English Law Ordinance, 1867), ran: "From and after the passing of this ordinance the civil and criminal laws of England as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the colony of British Columbia." After federation this enactment was re-enacted in each successive revision of the local statutes, and now appears in the Revised Statutes of 1911 as s. 2 of c. 75. Whether in virtue of this enactment the Matrimonial Causes Act, 1857, was in force in British Columbia was a question that came before the Privy Council in 1908 (*Watts* v. *Watts* (1908), A.C. 573), and it was held that the English Act of 1857 did apply to British Columbia, and that the local Courts had jurisdiction to pronounce decrees of divorce.

Manitoba was made a Province of the Dominion on the 15th July, 1870. In 1888 a Dominion statute was passed (51 Vict., c. 3), which by s. 1 enacted that "the laws of England relating to matters within the jurisdiction of the Parliament of Canada as the same existed on the 15th day of July, 1870, were from the said day and are in force in the Province, in so far as applicable to the Province," and subject to any subsequent legislation. This enactment now appears in the Revised Statutes of Canada, 1906, as s. 2 of c. 99. The Privy Council have held in the recent case of *Walker* v. *Walker* (*sup.*), that this enactment has had the same effect in making the English Act of 1857 applicable to Manitoba and giving the Manitoba Courts divorce jurisdiction

as the British Columbia enactment of 1867 had with respect to British Columbia. It was laid down that the English Matrimonial Causes Act, 1857, did much more than set up a new Court, and actually introduced new substantive law, giving the new Court a new jurisdiction arising out of the principle then first introduced into the law of England—the right to divorce *a vinculo matrimonii* for certain matrimonial offences. This right, it was held, thus became part of the substantive law of Manitoba.

A similar decision was given in *Board* v. *Board* (*sup.*), with respect to the right of the Alberta Courts to entertain proceedings for divorce. The Provinces of Alberta and Saskatchewan were in 1905 formed out of the North-West Territories and took with them the law in force in the North-West Territories. A Dominion statute relating to the territories (49 Vict., c. 25), enacted by sec. 3, that English law as on the 15th July, 1870, should be in force, in the same manner as already stated with regard to Manitoba. This enactment is now s. 12 of Rev. Stat. Can., 1906, c. 62. The Alberta courts have now therefore been finally held to have the divorce jurisdiction conferred on the English Court in 1857. The same reasoning will apply to the Province of Saskatchewan, so that four of the Canadian provincial Courts must now be taken as fully qualified to grant decrees in divorce, notwithstanding that the Provincial Legislatures cannot pass any statutes relating to divorce, and no direct legislation on the subject has been set on foot by the Dominion Parliament. This is hardly a result that could have been contemplated by the framers of the British North America Act, 1867.

The Privy Council decisions, though finally declaring that the Matrimonial Causes Act, 1857, applies *mutatis mutandis* in British Columbia, Manitoba, and Alberta—and inferentially Saskatchewan must be included—do not place these Provinces on precisely the same footing as England with respect to divorce law. The amending Act of 1884 (47 & 48 Vict., c. 68), for instance, will not be in force in Canada. By s. 5 of this amending Act failure to comply with a decree for restitution of conjugal rights is made equivalent to desertion, and a right to judicial separation or dissolution of marriage may accrue to the injured spouse.

This will not be possible in Canada, and the application of English law to cases in the Canadian Courts will require care and discrimination."

CONSTITUTIONAL SAFEGUARDS—HOW FAR CAN DELEGATES DELEGATE,

The British constitution, with its array of a few foundation principles, and the absence of any process by which these principles can be varied, has always been thought to be free from the danger of undergoing alterations. Written constitutions can undergo alterations, because they always contain some provisions for the introduction of amendments.

To most persons the idea that the British constitution has changed will come as a surprise. It has been our boast in the past, is our boast still, and will so remain, many think, until there comes a revolution more disastrous than any we have yet experienced.

Is the British constitution undergoing alterations, or are those traditions handed down to us through ages, some of which have been crystallized into statutes, and upon which the fabric of the Imperial dominion has been constituted, undergoing a process of alteration? It seems to be so, and the same remark applies to the Canadian constitution, which is partly written and partly unwritten.

The sovereignty of Parliament as it was formerly understood meant in Great Britain, The King, the Lords Temporal and Spiritual, and Commons. In Canada, the King, the Senate and Commons. In both, all acting together constitute Parliament, and this Parliament has "the right to make or unmake any law whatever." In England an important and radical change has been introduced. Down to 1911 no Act of Parliament could be passed without the consent of both Houses. The House of Lords had the right and power to check any bill sent up to it by the House of Commons. The Lords may still discuss a money bill for a calendar month, but they cannot prevent its becoming an Act of Parliament at the end of that month. It is only in this case that the Parliament

Act abolishes the veto of the Lords, but in every case it changes it from a final to a suspensive vote. If a bill has been passed by the Commons without any material change, and rejected by the Lords in each of three successive sessions, and that at least two years shall have elapsed between the date of the second reading in the first session, and the date on which it passes the Commons in the third session, it may be presented to the King for his assent, as though the Lords had not rejected it.

The change is not a matter of form but of substance, and is more radical and serious than formal. The result of the Parliament Act, which may have been foreseen at the time it was passed and perhaps was one of its objects, is that the Lords have been deprived of a power which might be and sometimes was used with very real benefit to the nation—the power of compelling a dissolution. Before the passing of the Parliament Act the Lords very rarely rejected or altered a money bill. Their absolute veto has for years been nothing more than a suspensive veto.

If the Lords forced a dissolution and a general election took place, and if the results proved that the electorate endorsed the Commons, the Lords by a well-established custom offered no further resistance to the Government proposals. The Parliament Act provides no similar security. The more distrustful the country becomes of its representatives, the more unwilling those representatives will be to appeal to it. A Government whose popularity is on the wane will be opposed to a dissolution. With the Parliament Act in force, the power of the Upper Chamber to enforce a dissolution is destroyed, and the consequence is that at every general election the constitutencies are divested of political power for a term of five years.

Recents Acts of Parliament in Canada and the different Provinces have given judicial and quasi-judicial authority to certain Government officials. In different ways in Canada this is done by the Railway Act of Canada, with reference to the powers conferred upon the Board of Railway Commissioners, the Public Utility Acts of the Provinces, and the various Land Titles Acts or Acts respecting real property.

The decision of certain questions has been expressly removed from the domain of the Courts of Law and given to authorities

appointed to carry out the purposes of certain Acts. Whether these changes are convenient from the point of view of the man of business is problematical. A business man possibly could not efficiently carry out the business if tied down by the rules, some of which are artificial, but for which there is strong reason, which check and rightly check the action of a Judge. But that is not an argument that these rules should be abolished and others substituted for them which do not afford the check, which centuries of experience have disclosed are necessary. It is in these rules that the private citizen finds his most effective protection against arbitrary government. To remove the occasional fetters which the Courts have imposed upon the acts of official persons, we have deprived ourselves of our very best safeguard against official tyranny.

No doubt the delegation by the Legislature of its functions to quasi-judicial authority is the result of the serious mistrust felt by large classes of persons in the Government and partly because the Legislature itself is not opposed to relieving itself of controversial issues so long as it is not divested of political power and patronage.

Acts have been passed which have conferred extraordinary powers on authorities. For instance, the Public Utilities Act of Manitoba. Under that Act the Public Utility Commissioner for the time being is a law unto himself without any check. His mind may be judicial or otherwise. He is not obliged to follow precedent. He is not bound by the technical rules of legal evidence. His decision upon any question of fact or law within his jurisdiction is conclusive. He has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred upon him by the Act or by any other Act, and, save as provided in the Act, no order, decision or proceeding of the Commission shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any Court even when the question of its jurisdiction is raised. The only ground on which an appeal lies is from a final decision of the Commission upon any questions involving the jurisdiction of the Commission. Under the Act it would be very difficult to say when

the Commission has made a final decision, because the Commission, at any time, may order a re-hearing and extend, revoke or modify any order made by it. A Commissioner who did not desire his jurisdiction contested could unreasonably delay matters to the detriment of the parties interested. The experience of litigants has been that even Judges have endeavored to delay appeals in cases of their decisions. If there is an appeal from a Court of Law and Equity in ordinary cases, why should a Public Utility Commissioner be placed in a higher plane? It is not good for one man to have such far-reaching powers.

It was the glory and happiness of our excellent constitution that to prevent any injustice no man is to be bound by the first judgment, but that if he apprehends himself to be aggrieved, he has another Court to which he can resort for relief.

Important and delicate questions involving property and rights of large value are to be submitted under the Act with no appeal. The important curb upon a Judge is to always have the right of appeal hanging over him, an efficacious remedy as it has been proved in many cases. Such an official may satisfy his own mind, but it is quite another thing to satisfy the law. He is subject to no effective discipline, his rulings may have continuity or not, his foot may be long or short.

The appointments of such authorities, as the appointments of many Judges, are political in a sense, and if made for proper qualifications would be satisfactory to that extent, but it is too much to expect that such appointments would always be so from the appointments in the past of other authorities, and even some of those to the Bench.

No doubt the principle, with proper safeguards, of delegating powers to such quasi-judicial authorities has been found convenient, particularly so on this continent where there has always been the conflict between the public utility and the municipal authorities, and the result may be, if the Act is administered and carried out in the spirit in which it was enacted, that evenhanded justice may be administered between conflicting interests. The municipal authorities however represent the masses; the public utility the investment classs. The municipality can generally

cry loudest, and it is just a question whether the result will not be that the quasi-judicial authorities' decision is imperceptibly deflected from impartiality. The human factor must be considered.

As rights of decision are conferred upon Commissioners in a large number of matters now, it is quite impossible to say where it will end. The people seem to be running mad on it. We may get so far soon that the country will be governed by commission and the people will find themselves divested of political power. This may be the result of the extraordinarily wide franchise that we boast about, a stake in the country is immaterial. The more ignorant and illiterate the voter, the more he distrusts those who he places in power, and desires some check upon his representative. He trusts himself to vote for someone he never should vote for.

The various Acts affecting real property and titles to land have provided in some jurisdictions that a mortgage can be foreclosed only by following the procedure provided for that purpose by the Act itself. The Australian Courts and the Privy Council have decided that the only way a mortgagee could extinguish the rights of a mortgagor was by foreclosure under the Act or by sale under the Act. Foreclosure by the Courts was satisfactory, but now, and I have never heard a reason given for the change, the jurisdiction of the Courts which has existed for ages is ousted. Here again the mind of one man is paramount. The Registrar's successor, or whatever the official's name may be, is in no way bound to follow the technical rules laid down by his predecessor, more often than not unwritten and handed down from memory, and these officials are almost as jealous of their rights as the Chancery and Common Law Judges used to be.

The practice has not been to find such authorities any more expeditious than the Courts, except possibly the Board of Railway Commissioners which exists under peculiar circumstances and is certainly an improvement upon the old Railway Committee of the Privy Council, especially the practice of hearing cases in different parts of the Dominion.

If some of the functions delegated to the quasi-judicial authorities were vested in them as subordinate officials of the Courts,

there would be some security and effective check on their proceedings.

The law Courts have in one or two instances discovered an unsuspected weakness in the official armour created by these Acts, but with these exceptions the rule of law has been suspended in the interest of those who wear it, and the Legislature promptly comes to the rescue of its protegé and passes an amendment. From such interference the ancient veneration for the rule of law has suffered in the last few years a marked decline.

H. P. BLACKWOOD.

CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION.

The object of this conference has been referred to in our summary of the proceedings of the Canadian Bar Association recently held at Winnipeg. It deserves more than passing notice as it is of great importance to the commercial world and this country, that the law on a variety of subjects should be uniform in all Provinces. The labors of the members of this conference deserve the attention and support of the Federal as well as the Provincial Governments, of Boards of Trade, of representatives of the various commercial associations, and of business men generally.

This conference is the result of the appointment by the various Provincial Governments of three lawyers from each Province; who are asked to discuss and recommend such legislation as may be desirable for the attainment of the end in view. Several of the Provinces have already named their representatives and these with others who have not yet any official sanction have begun the work which is proposed to be carried on. Members of the profession can materially aid those who are now voluntarily giving their time to this important matter by making such suggestions as may seem to them desirable. And here we may remark that Lord Bacon once said "Every man owes a duty to the profession to which he belongs." Here is an opportunity.

Mr. John D. Falconbridge, of Toronto, one of the commissioners appointed by the Province of Ontario, is acting as Record-

ing-Secretary, and has devoted much time and thought to the conference and has done much valuable work in connection therewith.

The following memorandum which introduces the second report of the conference gives further information as to its object and as to what has already been done:—

"It has long been generally recognized that the independent action of the various Provincial Legislatures has resulted in a diversity of legislation which, especially with regard to commercial law, raises a serious obstacle to commercial intercourse between different parts of the Dominion and is a source of embarrassment to British and foreign merchants doing business in Canada. In the United States, where a similar but perhaps more complicated situation exists, work of great value has been done by the National Conference of Commissioners on Uniform State Laws. For the past twenty-eight years these commissioners have met annually and have drafted various uniform statutes, and the subsequent adoption by many of the State Legislatures of these statutes has secured a substantial measure of uniformity on various subjects.

The obvious benefits resulting from the meetings of the State commissioners in the United States suggested the advisability of similar action being taken in Canada, and on the recommendation of the Council of the Canadian Bar Association several of the Provinces passed statutes providing for the appointment of commissioners to attend a conference of commissioners from the different Provinces for the purpose of promoting uniformity of legislation in the Provinces.

The first meeting of the commissioners appointed under these statutes and of representatives from those Provinces in which no provision has been made for the formal appointment of commissioners, took place in Montreal on the 2nd day of September, 1918, and at this meeting the Conference of Commissioners on Uniformity of Legislation in Canada was organized. Although the work of the commissioners at their first meeting was necessarily of a tentative and preliminary character, provision was made for the consideration of various subjects by committees during the ensuing year.

The second annual meeting of the Conference took place in Winnipeg on the 26th, 27th, 28th and 29th days of August, 1919.

Several sessions were devoted to the consideration of drafts of model statutes relating to the following subjects:—

(1) Legitimation by subsequent marriage.

(2) Bulk sales.

(3) Conditional sales.

(4) Fire insurance policies.

The Conference also considered and adopted the reports of committees on the following subjects:—

(1) Legislative drafting.

(2) Sales of goods and partnership.

As noted in the last mentioned report, the English Sale of Goods Act, 1893, has been adopted in New Brunswick and Prince Edward Island, as a result of the first meeting of the Conference. This statute is now in force in all the Provinces of Canada except Ontario and Quebec. The English Factory Act, 1889, has also been adopted in New Brunswick, and is now in force in six Provinces.

Statutes have been passed in some of the Provinces providing both for contributions by the Provinces towards the general expense of the Conference and for payment by the respective Provinces of the travelling and other expenses of their own commissioners. It is hoped that similar statutes will be passed by the other Provinces. The commissioners themselves receive no remuneration for their services.

It seems desirable to direct attention to the fact that the appointment of commissioners does not bind any Province to accept any conclusions arrived at by the Conference and that such uniformity of legislation as may be secured by the labours of the Conference will depend upon the subsequent voluntary acceptance by the Provincial Legislatures of the recommendations of the Conference."

DIVORCE APPEALS IN WESTERN PROVINCES.

Is there an appeal in divorce cases in Manitoba, Saskatchewan, Alberta and British Columbia? The point will undoubtedly arise soon in Manitoba and the other Western Provinces as to whether or not there is an appeal to the Provincial Courts of Appeal from the decision of a single Judge in divorce cases.

In the case of *Scott* v. *Scott*, 4 B.C.L.R. (1891), p. 316, the full Court of British Columbia held that there was no appeal to that Court in divorce matters because the Provincial Legislature which created that Court had not power to confer divorce jurisdiction on any Court, and hence it could not provide for an appeal in divorce matters. Again, in the case of *Brown* v. *Brown*, 14 B.C.L.R. (1909), p. 142, the full Court of British Columbia held that it had no jurisdiction to hear appeals final or interlocutory in divorce matters. This last case appears to have been fully argued with eminent counsel on each side. In the *Brown* case the decision in *Scott* v. *Scott* was affirmed and approved. From the reasoning of the Judicial Committee however in the *Walker* and *Board* cases it would appear that a Provincial Legislature can confer jurisdiction in divorce on a Court which it creates. This principle runs all through the argument and the judgments in *Walker* and *Board*. Hence if a Provincial Legislature of any of the above Provinces has provided for appeals from any judgment, decision, order or decree of a single Judge, etc., it would follow in the absence of Dominion legislation that there is an appeal to the provincial Court of Appeal in divorce matters.

Divorce has hitherto been viewed as a matter separate and apart from almost every other subject mentioned in the B.N.A. Act, but it is submitted that the effect of the discussions before the Privy Council in the *Walker* and *Board* cases and the judgments themselves indicate clearly that as matters stand at present the administration of the divorce law in the above four Provinces falls to the Provinces. Hence there can be an appeal to the provincial Court of Appeal in a divorce matter just as there can be an appeal in a matter arising out of bills and notes, banking etc., provided of course that the Act constituting the Court of Appeal so provides.

It would seem anomalous that a modern community should have no appeal from the finding of a single Judge in such an important matter as divorce. There would practically be no appeal if the *Scott* and *Brown* cases are rightly decided. There is of course always an appeal to the King-in-Council but such is too expensive for the average citizen.

Winnipeg, Man. JOHN ALLEN.

UNAUTHORISED PRACTICE OF LAW.

This Journal has always taken the ground and frequently referred to the wrongs suffered by the legal profession at the hands of the host of unlicensed practitioners and conveyancers. No remedy has been found, or rather none seems possible when many of our Provincial legislators are the robbers or are in various ways in alliance with them. Although the subject is we fear of only academic interest we reproduce the words of a writer in the *Law Notes*, Northfield, U.S.A., as follows:—

"A collateral advantage which would flow from a better organization of the Bar is the check which might thereby be put on the many petty encroachments on the domain of the legal profession. Probably the great majority of the deeds and mortgages made in the United States are drawn by real estate brokers and the like. Sometimes, of course, nothing more is required than the mere clerical ability to fill out a blank form. In other cases, the utmost care and skill in the use of technical phrases is necessary to carry out the intention of the parties, and neither the average grantor nor the average real estate dealer is able to recognize such an instance when it arises. The security of land titles and the avoidance of legal disputes in respect to them is a matter which deeply affects the public interest. The evils of allowing a layman to conduct a proceeding in Court are in some respects less than those of allowing him to draw an instrument on which depends the title to landed property—perchance a modest home, the product of years of industry and thrift. There are few lawyers who cannot recall a case where a title has been thrown into liti-

gation, if not lost, because of an error in the deed which no member of the profession would have committed. There is possible, of course, the cynical view that the amateur draftsman brings into the profession fees for the litigation created by his blunders far exceeding those which could have been charged for the original service. This does not, however, represent the attitude of the profession, which has repeatedly shewn by its advocacy of workmen's compensation Acts and similar measures, its willingness to sacrifice its financial interest to the public welfare. Apart from the injury to the public from the blunders inevitable in the drawing of instruments of title by laymen, the practice works a distinct hardship to the younger members of the profession. The young lawyer, precluded by the code of ethics from soliciting employment, is forced to see this class of work which he has been specially trained to perform go into the incompetent hands of laymen who are bound by no restrictions of professional ethics, and to lose thereby not only the small though sorely needed fees, but also the valuable opportunity to lay the foundations for future employment by his skilful performance of these minor services. A suggestion recently made, which may go impracticably far yet is deserving of serious consideration, is that every lawyer should be *ex officio* a notary public, and that the office of notary should be confined to members of the legal profession. While the position of notary has lost much of its ancient dignity it still retains functions which are capable of use in the perpetration of fraud. The restriction of those functions to members of a learned profession subject to professional discipline would largely do away with the antedated acknowledgments and similar frauds which the practitioner occasionally encounters."

JUDICIAL CHANGES IN ENGLAND.

There have been many judicial changes in England recently. The following were announced on Nov. 1st. Sir Charles Swinfen Eady, Master of the Rolls, has retired much to the regret of the Bar, Lord Sterndale taking his place. Lord Justice Duke becomes President of the Probate, Divorce and Admiralty Division. Mr.

Justice Younger has been appointed to fill the vacancy thus created in the Court of Appeal. This selection has been criticised by some of the legal journals as other Judges of greater seniority and of at least equal merit have been passed over in his favour. This does not often happen in England, but is not unknown in this country, and this without public criticism. The probable reason for the lack is that in small communities criticism necessarily becomes more or less personal; which is a pity, as public sentiment should always be sounding in the ears of those responsible for objectionable appointments. Mr. Frank Russell, K.C., son of the late Lord Russell, is the new Chancery Judge taking the place thus vacated.

REPARATION FOR CRIME.

The assertion of the Common Law that "there is no wrong without a remedy" sounds very well, but is found in practice to have so many exceptions as to induce some of the wronged ones rather to submit quietly and to take comfort in another assertion that "Vengeance is mine, I will repay saith the Lord"—and so put them selus in the care of the Kings of Kings rather than take chances in the Courts of an earthly King.

The *Law Notes* (Northport, N.Y.), in an article under the above caption discusses an interesting question in the above connection, and refers to what is sometimes a failure of justice, in that there is no provision in the law for a person injured by a criminal, for the punishment of such criminal in such a way as to give reparation to the victim. Let us suppose the case of a man with a wife and family being incapacitated for work by some criminal act, and the man their only support. The criminal is sent to prison or penitentiary at hard labour; but the work he he does enures to the benefit of the state; or, perhaps, the prisoner is kept from productive work lest its product should come into composition with that of some Labour Union. The product certainly ought to go to his wife and family. Could not some legislation be devised to provide a remedy for this manifest wrong? Our Provincial Legislatures will soon be at work grinding out statute law, and some of the new members might like to have

a suggestion. The usual refuge for some destitute legislator from the rural districts who desires to shew his constituents that he is at work, is to bring in a Bill to amend the Municipal Act. Let him try his prentice hands on the above subject and make himself famous.

LIGHT LEGAL LITERATURE FOR LAWYERS.

Lord Finlay, in his address to the Bar on a recent occasion (*ante* p. 339), bore witness to the necessity of paying more attention to a much neglected branch of legal education or what might be called a necessary foundation stone in the building up of legal education in one who seeks to excell in the legal profession. He expressed his opinion that wide reading and literary culture outside of the reading of pure law, he expressed this in the following words: "Students should not confine themselves to the study of law alone, if you do, you will not be a good lawyer, you must remember that the law concerns itself with mankind and is as broad as that word."

We are reminded of this by a very bright little volume by Charles Morse, K.C., D.C.L., under the title of "Apices Juris," published a few years ago. We would recommend it to our readers. It is published by the Canada Law Book Company. We hope occasionally, as space permits, to make some extracts from its pages. We cannot begin better than by giving his fine testimony to the qualities of one of the greatest of all the leaders of the Canadian Bar, beloved and revered by all his brethren, the late Christopher Robinson, K.C. This reference is especially appropriate at this time as Mr. Robinson was an example of the kind of lawyer that would appeal to such a good judge of what a lawyer ought to be as the ex-Lord Chancellor of England:—

CHRISTOPHER ROBINSON, OBIIT, 31ST OCTOBER, 1905.

God is no niggard when He makes a man
To stand as an exemplar to his time.
The strength that crowns him, and the aim sublime
Moulding his every action that we scan

Persuade us that not here is our true clime;
Not here in this low vale where Life began
But ends not, no, nor ever sees its prime,
Shall we the Soul's high mansion build or plan.

Even such an one was he who late hath gone,
Beyond our greetings and beyond our ken,
Into the Master's peace and benison.
Careless of honours prized by lesser men,
From youth to age he held our homage, then
Ended at eventide his race well run.

It is often said, and truly, that marriage revokes a will. Sec. 18 of 1 Vict. c. 26, is explicit on that point, but it contains the following important exception: "Except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the Statute of Distributions." But a will made in exercise of a power is not revoked by marriage where the heir executor, or administrator, or statutory next of kin would not *in all events* take in default of appointment: (*In Bonis Fenwick*, L. Rep. 1 P. & D. 319). Nor is the will revoked if the gift in default of appointment is to the children of the testator, or to the next of kin simply, instead of statutory next of kin: (*In Bonis McVicar*, L. Rep. 1 P. & D. 671).—*Law Times*.

That the increase in the cost of living and in all the necessities of life over the cost at the time lower verdicts allowing damages for personal injuries were rendered must, to some extent, be taken into consideration in determining whether or not a verdict in such a case was excessive, is held in the Iowa case of *Noyes* v. *Des Moines Club*, 170 N.W. 461, annotated in 3 A.L.R. 605.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

SHIP—CHARTERPARTY—HIRE PAYABLE IN ADVANCE—DEFAULT IN PAYMENT OF HIRE—WITHDRAWAL OF SHIP—RE-DELIVERY—APPORTIONMENT OF FREIGHT.

Italian State Railways v. *Mavrogordatos* (1919) 2 K.B. 305. A time charterparty of a vessel had been granted to the plaintiffs by the defendants subject to the condition that the hire should be paid monthly in advance, and in default the defendants should be at liberty to withdraw the vessel without prejudice to any claim they might have. The hire was payable until the vessel's re-delivery at a port in west Italy. On 10 January, 1917, a month's hire became due and was not paid; on 11 January, 1917, while the ship was on her way to Barry under the charterers' orders the defendants wrote to the charterers withdrawing the vessel from the service. The ship arrived at Barry on the 23 January, 1918, and the defendants took possession of her there. This action was brought claiming a declaration that the charterparty was still subsisting. The defendants counterclaimed for hire until the 23 January, when as they contended the ship was re-delivered to them; but Sankey, J., held that the defendants had cancelled the charterparty on the 11 January, 1918, and consequently were not entitled to recover any hire after that date; and the Court of Appeal (Bankes and Duke, L.JJ., and Lawrence, J.), affirmed his judgment.

ADMIRALTY—SALVAGE OF NEUTRAL VESSEL BY WARSHIP—RESCUE OF VESSEL FROM GERMAN SUBMARINE—CLAIM OF SALVAGE BY KING'S SHIP—QUANTUM OF SALVAGE—NAVAL PRIZE ACT, 1864 (27-28 VICT. C. 25), S. 40.

The Svanfos (1919) P. 189. This was an action for salvage by the commander, officers and crew of H. M. Submarine G. 7. The defendants were the owners of the two vessels in question. Both were Norwegian vessels. They were attacked by a German submarine which was making preparation to destroy them when the G. 7 appeared on the scene and drove off the German submarine. One of the vessels on seeing the German submarine retire, steamed away under her own steam, the other was in a leaky condition and a crew was put aboard who with great difficulty stopped the leaks and enabled the boiler fires to be lit, and on a Norwegian war vessel subsequently appearing at the request of

its commander this vessel was handed over to his care and thereafter reached a Norwegian port. Hill, J., who tried the action, held that the plaintiffs were entitled to salvage in the circumstances having regard to the altered conditions of warfare arising from the German practice of destroying captured neutral vessels. He also held that the Naval Prize Act, 1864, has no application to foreign vessels. He fixed the salvage of the vessel which got off under her own steam at £1,000 and that of the one which was leaky at £1,300.

ADMIRALTY—PILOTAGE—COMPULSORY PILOTAGE UNDER DEFENCE OF THE REALM REGULATIONS — PILOT NOT SERVANT OF SHIP-OWNERS — LIABILITY OF SHIP-OWNERS FOR COLLISION UNDER PILOTAGE—PILOTAGE ACT, 1913 (2-3 GEO. V. c. 31), s. 15.

The Chyebassa (1919) P. 201. This was an action for damage occasioned by a collision. The ship at the time the collision took place was under compulsory pilotage under the Defence of the Realm Regulations. The owners sought to escape liability on the ground that the pilotage was compulsory and the pilot who caused the collision was not their servant; but Roche, J., who tried the action, held that the Pilotage Act, 1913, s. 15, had in effect deprived the owners of that defence.

PRIZE COURT—ENEMY PROPERTY SOLD TO NEUTRAL—CONTRABAND —PASSING OF PROPERTY—DECLARATION OF PARIS. ART. 2— KNOWLEDGE OF NEUTRAL SHIP-OWNER OF NATURE OF CARGO— CONDEMNATION OF SHIP—INTEREST ON PROCEEDS OF SALE RELEASED.

The Dirigo (1919) P. 204. This was a proceeding in the Prize Court for the condemnation of several ships and cargoes in the following circumstances: The ships were neutral Scandinavian ships, the cargoes consisted of goods of a contraband character sold by a United States branch of a German firm to neutral firms in Scandinavia. The goods were sold and shipped in the United States to the order of the buyers in ships named by them. In some cases the property in the goods remained in the vendors at the time of the seizure of the vessels and in such cases the cargoes were condemned as prize. In other cases the property had passed to the buyers and the question arose how far the doctrine of prize law against the passing of property during a voyage applied. As to such cases Lord Sterndale, President P.D., held that where the shipment was made on the terms of payment on tender of documents at the time of shipment and such payment was made

that would be sufficient to pass the property even though the payment were not actually made until after the voyage had commenced and in such cases the goods were not liable to condemnation. It was also claimed on behalf of the Crown that under Art. 12 of the Declaration of Paris enemy goods carried under a neutral flag were liable to condemnation even if they were not contraband; but the learned President was of the opinion that under that article the goods of an enemy were protected from seizure when carried in a neutral vessel provided they have not an enemy destination. He also held that where a cargo has been seized and sold before condemnation, and the proceeds are subsequently released to the claimants thereof, the Crown is not as a rule liable to pay interest on the proceeds.

COMPANY—WINDING-UP—SEIZURE BY SHERIFF BEFORE PRESENTATION OF PETITION—RENT PAID TO LANDLORD BY SHERIFF—LANDLORD AND TENANT ACT, 1709 (8 ANNE, C. 14), S. 1. (R.S.O. C. 155), S. 55.—COMPANIES ACT, 1908 (8 EDW. 7 C. 69), SS. 139, 140, 142, 211.—(WINDING-UP ACT R.S.C. C. 144, SS. 5, 18, 23).

The British Salicylates Ltd. (1919) 2 Ch. 155. This was a summary application by the liquidator of a company to compel a Sheriff to pay over the rent which he had paid to a landlord in the following circumstances: Prior to the presentation of the petition to wind up the company a writ had been placed in the Sheriff's hands against the company under which he had made a seizure of the company's property; after the presentation of the petition an application was made to the Court to stay the execution, which was refused; the Sheriff thereupon sold the goods seized, and out of the proceeds paid the claim of the landlord not exceeding one year's arrears of rent as provided by 8 Anne, c. 14, s. 1 (R.S.O. c. 155, s. 55) and after deducting the amount of the plaintiffs' debt and costs, handed the balance to the liquidator. Astbury, J., held that the Sheriff had properly made the payment to the landlord and rejected the application of the liquidator.

SETTLEMENT—LIFE POLICY—COVENANT BY HUSBAND—LAPSE OF POLICY THROUGH HUSBAND'S DEFAULT—RIGHT OF TRUSTEES TO IMPOUND HUSBAND'S INTEREST.

In re Jewell (1919) 2 Ch. 161. By a marriage settlement whereby the property of husband and wife were settled, a policy was assigned by the husband to trustees on the trusts of the settlement and the husband covenanted to keep it in force. Owing to the husband's default the policy lapsed. The settlement expressly provided

that the trustees might in their discretion apply the income of the wife's fund towards the payment of the premiums for "keeping on foot or restoring" the policy. The wife died in 1904 and there was one child the issue of the marriage. Two questions were submitted to Younger, J., for adjudication: (1) Did the provision as to the application of the wife's fund "for keeping on foot or restoring" the policy apply to a lapsed policy? and as a matter of construction, the learned Judge decided that it did not. The other question was whether the trustees were entitled to impound the husband's interest under the settlement towards making good the loss sustained by reason of his failure to keep the policy on foot, and this question the learned Judge answered in the affirmative, being of the opinion that on general principles of equity neither the husband nor his assigns could take anything out of the wife's fund without first making good to the trust estate the loss occasioned by the husband's default, and that the trustees were therefore entitled to retain the income of the wife's fund during the husband's life until a policy upon his life for the amount covered by his covenant had been effected in their names, or until there had been retained thereout the surrender value for the time being of the original policy which had lapsed.

WILL—CONSTRUCTION—BEQUEST OF CHATTELS "AT" A SPECIFIED HOUSE—"FURNITURE"—"OBJECTS OF VIRTU AND CURIOSITES"—RARE BOOKS AND MANUSCRIPTS—PLATE DEPOSITED WITH BANKER FOR SAFE KEEPING.

In re Zouche (1919) 2 Ch. 178. This was a summary application to Lawrence, J., on the construction of a will whereby the testatrix had bequeathed "the furniture, pictures, plate, articles of virtu and curiosities at Parham House at the time of my decease." At this house was a collection of books and MSS. arranged on shelves running all round a room in the house called the library, and it was held by the learned Judge that this collection did not as a whole pass under the will under the bequest of furniture, but that rare and artistic books and MSS. part of the collection might pass as "articles of virtu or curiosities" and an inquiry was directed on this point. The testatrix had a quantity of plate which she had sent to her bankers for safe keeping when she let Parham House furnished, and so remained at the time of her decease. She had also lent the British Museum some rare books and MSS. for exhibition and which were still there at the time of her death, and the learned Judge held that neither these nor the plate passed under the above bequest.

WILL—SPECIFIC LEGACY—ADEMPTION—ORDER IN LUNACY—MISTAKE—RULE IN CLAYTON'S CASE.

In re Hodgson, Public Trustee v. *Milne* (1919) 2 Ch. 189. An interesting little point, as Peterson, J., says, was presented in this case. A lady being of sound mind made a will specifically bequeathing a sum in consols. She subsequently became lunatic, and under a misapprehension that her income was insufficient to provide for her maintenance, an order was made in Lunacy for the sale of the consols and the application of the proceeds towards her maintenance. After the consols had been sold and proceeds paid into Court and a sum of £48.11.11 paid thereout towards her maintenance, it was discovered that there were dividends in Court to which she was entitled sufficient for her maintenance which were subsequently paid to the credit of her account under s.123(1) of the Lunacy Act, 1890 (see R.S.O. c. 68, s. 19(1)). The lunatic and his legatees are entitled to the same rights in the proceeds of the property of the lunatic ordered to be sold, as they would have in the property if it had not been sold, so that the right of the specific legatees in the balance of the proceeds of the consols was conceded, but they claimed that they should also get the £48.11.11 applied thereout for maintenance. On the other hand, the residuary legatees claimed that not only that sum but all subsequent payments out of the account should under the rule in *Clayton's* case be treated as payments out of the proceeds of the consols, notwithstanding sufficient sums from income had been subsequently paid into the credit of the bank account. But the learned Judge refused to give effect to this contention, but held that the £48.11.11 had in fact been paid out of the proceeds of the consols, and that though the specific legatees were entitled to the balance of the proceeds, they were not also entitled to be paid that sum.

Reports and Notes of Cases.

England.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

Viscount Haldane, Lords Buckmaster, Dunedin, Shaw and Scott Dickson.] [48 D.L.R. 1.

WALKER v. WALKER.

Divorce and separation—Imperial statute in force in Manitoba—Dominion legislation—Provincial legislation—Jurisdiction of Court of King's Bench to entertain divorce actions.

The Dominion Act of 1888, which was passed to remove certain doubts as to the application of certain laws to the Province of Manitoba so far as it extended to the subject of marriage and divorce, was within the exclusive power of legislation conferred on the Dominion Parliament by s. 91 of the B.N.A. Act. This Act provided that the laws of England relating to matters within the jurisdiction of the Parliament of Canada so far as the same existed on July 15, 1870, had been as from that date and were in force in Manitoba insofar as applicable to the Province, and unrepealed by Imperial or Dominion legislation.

Their Lordships held, following the *Watts* v. *Watts* case ([1908] A.C. 573), that this Act was sufficient to make the provisions of the English Divorce and Matrimonial Causes Act of 1857 part of the substantive law of Manitoba. The English Act of 1857 not only set up a new Court, but introduced new substantive law and gave to the Court it constituted not only the jurisdiction over matrimonial questions which the old Ecclesiastical Tribunals possessed, but a jurisdiction arising out of the principle then for the first time introduced into the law of England of the right to divorce *a vinculo matrimonii* for certain matrimonial offences.

The Court of King's Bench Act, passed by the Legislature of Manitoba in 1913, was sufficient to give the Court of King's Bench jurisdiction to entertain petitions for divorce, and in respect of matrimonial offences.

APPEAL by defendant from the judgment of the Manitoba Court of Appeal, 39 D.L.R. 731, which held that the English divorce laws in force in 1870 were in force in Manitoba, and that

the Court of King's Bench had full power to administer these laws. Affirmed.

F. H. Maughan, K.C., and *Horace Douglas*, for appellant; *Sir John Simon*, K.C., and *John Allen* (Deputy Attorney-General for Manitoba) for respondents.

ANNOTATION FROM 48 D.L.R.

EXISTENCE OF JUDICIAL DIVORCE IN MANITOBA, SASKATCHEWAN AND ALBERTA AS DETERMINED BY THE PRIVY COUNCIL IN THE *Walker* V. *Walker* AND *Board* V. *Board* CASES. BY JOHN ALLEN, DEPUTY ATTORNEY-GENERAL FOR MANITOBA.

The judgment of the Privy Council in the case of *Walker* v. *Walker and the Attorney-General of Manitoba* is most interesting as finally determining that judicial divorce exists in Manitoba and has existed, in any event since the year 1888 when the Dominion Parliament enacted the Act c. 33, of the Statutes of that year, entitled "An Act respecting the application of certain laws therein mentioned to the Province of Manitoba."

It was argued before the Court of Appeal of Manitoba that the right to judicial divorce had existed in Manitoba since Jan. 7, 1864, because the Ordinance of the Governor in Council of Assiniboia introduced the laws of England of that date so far as applicable to the old Hudson's Bay Colony, and there could be no question of the applicability of the English law of divorce and matrimonial causes (c. 85 of 20 and 21 Vict.) after the decision in *Watts and Att'y-Gen'l for B.C.* v. *Watts*, [1908] A.C. 573. (See judgment of Cameron, J., in *Walker* v. *Walker and Att'y-Gen'l* (1918), 39 D.L.R. 731, at p. 752.)

The Judicial Committee, however, refused to deal conclusively with the effect of the Ordinance of 1864 and rest their judgment on the 1888 Dominion Act.

In the argument before the Judicial Committee it was pointed out that the Ordinance of 1864 had already been interpreted by the decision in *Sinclair* v. *Mulligan*, 3 Man. L.R. 481 and 5 Man. L.R. 17, as referring only to procedure and not to substantive law. Hence their Lordships in the Judicial Committee doubtless hesitated to upset the *Sinclair* v. *Mulligan* judgment which was rendered over thirty years ago, and founded their judgment on the 1888 Dominion Act which is expressed in language which leaves no room for doubt.

It would have been interesting indeed if the Judicial Committee had finally determined just what was meant by the old Ordinance of Jan. 7, 1864, which caused so much trouble to the early lawyers and judges in the Prov. of Manitoba.

It would appear, however, that the judgment in *Sinclair* v. *Mulligan* is not correct for the following reasons: Killam, J., held that the

Ordinances of April 11, 1862, and of Jan. 7, 1864, introduced procedure only and not substantive law. The Statute of Frauds is procedure and hence if the reasoning of Killam, J., is correct, the 1862 and the 1864 Ordinances and similarly the Ordinance of 1851 (found at p. 378 of Oliver) couched in the same language would introduce the Statute of Frauds. Hence the finding in *Sinclair* v. *Mulligan* that the Statute of Frauds was not introduced would appear to be incorrect. It is worthy of note that neither court in *Sinclair* v. *Mulligan* touched on the 1851 Consolidation of the Ordinances of the Governor and Council of Assiniboia.

The 1888 Dominion Act is as follows:—

An Act respecting the application of certain laws therein mentioned to the Province of Manitoba.

(Assented to 22nd May, 1888).

For the removal of doubts, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, declares and enacts as follows:—

1. Subject to the provisions of the next following section the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the fifteenth day of July, one thousand eight hundred and seventy, were from the said day and are in force in the Province of Manitoba, insofar as the same are applicable to the said Province and insofar as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the said Province, or of the Parliament of Canada.

2. Whenever, between the said day and the first day of March, one thousand eight hundred and eighty-seven, interest was payable in the said Province by the agreement of parties or by law and no rate was fixed by such agreement or by such law, the rate of interest was six per centum per annum.

3. Nothing in the first section of this Act contained shall affect any action, suit, judgment, process or proceeding pending, existing or in force at the time of the passing of this Act.

S. 1 above is the important section. This s. 1 was re-enacted in the same form in the 1906 revision of the Statutes of Canada.

Now "Divorce" is one of the subjects assigned exclusively to the Dominion Parliament by sub-head 26 of s. 91, of the B.N.A. Act. Hence the 1888 Dominion Act enacted that for Manitoba from July 15, 1870, the law as to divorce should be the law of England as of July 15, 1870, if the same were applicable. The case of *Watts and Att'y-Gen'l* v. *Watts, supra*, decided that the English Divorce and Matrimonial Causes Act of 1857 (which became law in Jan., 1858) was applicable to British Columbia on Nov. 19, 1858. Hence the divorce law of England of July 15, 1870, must have been applicable to Manitoba on that date. Hence the effect of the 1888 Dominion Act was to introduce into Manitoba the substantive law of England of July 15, 1870, as to divorce.

The counsel for the appellant, however, before the Judicial Committee argued at great length that there was not, on July 15, 1860, and is not now, any Court in Manitoba with jurisdiction in divorce pleas.

As respects jurisdiction of the courts the *Walker* case differs from the *Watts* case, because prior to the entry of British Columbia into Confed-

eration one law-making body there had full power to enact the substantive law, and to give jurisdiction to its courts, and as was conclusively shewn by the *Watts* case and the cases on which it depended, the substantive law had been introduced and the courts clothed with the fullest power to try divorce and other pleas. After the entry of British Columbia into Confederation the same law as to divorce remained in force, and its courts still retained their power to adjudicate in divorce pleas.

Prior to July 15, 1870, however, there was no Province of Manitoba. Hence if the 1888 Dominion Act did introduce into Manitoba the substantive English laws of divorce of July 15, 1870, without creating any Court there still remained the question as to whether or not the Provincial Legislature of Manitoba had created a Court with jurisdiction wide enough to hear divorce cases. It might be said that the argument before the Judicial Committee turned largely on the question as to whether or not the Provincial Legislature had created a Court with jurisdiction in divorce. At one stage of the argument Lord Buckmaster stated to Mr. Maughan, K.C., "If a man has certain definite statutory rights conferred upon him by the Dominion Parliament do you mean to say that the Provincial Parliament can render them wholly inoperative by not providing any means by which they can be made effectual?" Mr. Maughan replied that the Dom. Parliament could confer jurisdiction on a Prov. Court (see *Valin* v. *Langlois* (1879), 5 App. Cases, 115) or create a Court of its own under s. 101 of the B.N.A. Act. Viscount Haldane then interposed as follows:—

"That is quite a different thing, this meant a Court such as the Court of Exchequer in Canada for settling disputes between people in different Provinces."

This might indicate that s. 101 of the B.N.A. Act does not give the Dom. Parliament the fullest powers in creating courts. Perhaps, however, Viscount Haldane did not intend to finally determine the point.

The Judicial Committee hence took the broad ground that once there is a substantive law in force in any province, that law cannot be rendered nugatory by any legislation of the province. The Supreme Court of the Province must administer the law where no other provision is made. Hence the Legislature of Manitoba could not now validly enact that the Court of King's Bench shall not adjudicate in divorce pleas. Such legislation would be *ultra vires* if one interprets correctly what was said in the argument before the Judicial Committee.

If one traces the history of the General Quarterly Court, which existed in Assiniboia prior to July 15, 1870, it would appear that it had jurisdiction to adjudicate in "All causes, civil as well as criminal." (See Hudson's Bay Company's Charter) and did adjudicate in all kinds of cases as the records in the Provincial Library at Winnipeg shew. Such cases as the following were heard before it:—Criminal conversation, defamation, theft, murder, assault, selling beer, supplying Indians with drink, giving false statements of imports, trespass, rape, false pretences, seduction, defamatory conspiracy, perjury, infanticide, concealing birth, breach of contract, debts, manslaughter, kindling a fire in open plains, all kinds of civil claims.

The General Quarterly Court tried more than one murder case, and it inflicted the death sentence, which was carried out.

The General Quarterly Court adjudicated in Probate matters after 1858—Oliver, p. 569, also in regard to Guardianship of Minors—Oliver, p. 558.

As to the power and jurisdiction of the General Quarterly Court see Recorder Johnson's charge to the first Grand Jury in Manitoba reported in *The Manitoban* newspaper of May 20, 1871; Wood, C.J.M., in *R.* v. *Lepine*, Provincial Library Volume; Recorder Johnson's evidence before the Committee of the Dominion House to investigate the dispute as to boundary between Ontario and Manitoba—Provincial Library Volume.

The General Quarterly Court was in existence and exercised full power and authority on July 15, 1870, and for some two years thereafter until the Manitoba Supreme Court was created and a Judge appointed.

The General Quarterly Court was recognized by Imperial, Dominion and Provincial legislation. See s. 5 of Rupert's Land Act, 1868 (Imp.), ss. 5 and 6 of 32-33 Vic., c. 3 (Dom.), s. 36 of 33 Vic., c. 3 (Dom.), s. 2 of 34 Vic., c. 14 (Dom.), ss. 39, 40 and 41 of 34 Vic., c. 2 (Man.) Schedule A to c. 13 of 34 Vic. (Dom.) by which the General Quarterly Court was given certain bankruptcy jurisdiction by the Dominion, s. 5 of 34 and 35 Vic., c. 28 (Imp.), s. 1 of 35 Vic., c. 4 (Man.)

Hence it is submitted that after July 7, 1864, the General Quarterly Court of Hudson's Bay days could have adjudicated on divorce pleas if same had been brought before it, and this Court was clothed with this power on July 15, 1870, and thereafter until it went out of existence in 1872. Hence on July 15, 1870, there was a Court in Manitoba with full power to adjudicate in divorce pleas.

After the creation of the Manitoba Supreme Court its jurisdiction and constitution were changed from time to time by the Provincial Legislature. It is worthy of note that the first jurisdiction legislation of the Province after 1888 was in 1891. (See ss. 8 and 9 of c. 36 of 1891 Con. Stats. of Manitoba.) The foot note to said s. 9 has the reference "51 Vic. c. 33, s. 1 (D)." This is the 1888 Dominion Act which introduced the laws of England and shews conclusively that the draftsman of the 1891 Provincial Act had at his elbow the 1888 Dominion Act and drafted accordingly. The chairman of the board which consolidated the Manitoba Statutes in 1891 was Killam, J. Nowhere else in all the Statutes of Manitoba can one find a reference in a foot note to a Dominion Statute. The change which was made in the said jurisdiction s. 9 in 1891, together with this foot note referring to the Dominion Statute would indicate that the then Court of Queen's Bench was clothed with the fullest powers to meet the change in the law effected by the 1888 Dominion Act.

The Judicial Committee held that there is nothing in the present jurisdiction sections of the Provincial legislation cutting down the jurisdiction of the Court of King's Bench, and that it consequently has jurisdiction to adjudicate in divorce pleas. Hence the substantive law of Manitoba as to divorce and matrimonial causes must be found in the English Statutes in force on July 15, 1870. These are: C. 85 of 1857 Statutes (20 and 21

Vic.); c. 108 of 1858 Statutes (21 and 22 Vic.); c. 61 of 1859 Statutes (22 and 23 Vic.); c. 144 of 1860 Statutes (23 and 24 Vic.); c. 81 of 1862 Statutes (25 and 26 Vic.); c. 44 of 1864 Statutes (27 and 28 Vic.); c. 32 of 1866 Statutes (29 and 30 Vic.); c. 77 of 1868 Statutes (31 and 32 Vic.).

One will have to extract from these Statutes those parts which are applicable to Manitoba and such will constitute the substantive law of Manitoba as to divorce.

Those who next consolidate the Manitoba Statutes will have to go through the above mentioned English Acts and extract the divorce law of Manitoba. The same should be given the dignity of a chapter in the next Consolidation of the Manitoba Statutes (See c. 67 R.S.B.C. 1911, which is the English law of divorce of Nov. 19, 1858, so far as applicable to British Columbia.)

Unless the Canadian Parliament changes the law, Manitoba will continue to have as its divorce law the law of England of July 15, 1870, just as British Columbia continues to this day to have the law of England of Nov. 19, 1858. In the fifty years since Confederation no general divorce law has been enacted by the Parliament of Canada.

The 1856 English Act is the most important of the above. This enacted new substantive law and transferred all cases of divorce and matrimonial causes to the Court created by the Act and regulated the procedure of the Court. It in effect rendered unnecessary divorce by Act of Parliament for persons domiciled in England, and did away with the jurisdiction of the Ecclesiastical Court which jurisdiction was transferred to the new Court.

S. 27 of the 1857 English Act is important. It is as follows:—

> XXVII. It shall be lawful for any husband to present a petition to the said Court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery; and it shall be lawful for any wife to present a petition to the said Court, praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a *mensa et thoro* or of adultery coupled with desertion, without reasonable excuse, for two years or upwards, and every such petition shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded; provided that for the purposes of this Act incestuous adultery shall be taken to mean adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity; and bigamy shall be taken to mean marriage of any person being married to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere.

This shews that the new order of things does not effect any great change in the law. It is the method of administering the law which has been changed. Recently statements have been made in public to the effect that the *Walker* case will result in divorces being granted for reasons which have not prevailed hitherto. The Senate and House of Commons

have hitherto recognized adultery as the only valid ground for divorce, although in a few instances other reasons have prevailed. The woman was on the same level as the man in applications for divorce at Ottawa. Now, however, the Manitoba Courts will be compelled to give the man higher rights than the woman, as the above s. 27 indicates. Hence the Courts of Manitoba will not be able to grant divorces in some cases in which relief could be given at Ottawa.

It would appear that the Senate and House of Commons can still be appealed to by any Manitoba citizens who desire a private Bill. The Canadian Parliament did not surrender its rights to grant relief when it enacted the 1888 Dominion Act.

Perhaps where the wife cannot bring her case within the above s. 27, she will get relief by application to Ottawa, under the old procedure.

The *Walker* case was not one of adultery, but was one in which the wife asked for a decree on the ground of impotency. The Ecclesiastical Courts in England had jurisdiction to grant a decree of nullity for this reason, long before 1857. In the Alberta case of *Board* v. *Board* (*post* p. 13) adultery was alleged. Prior to the 1857 Act no court in England had jurisdiction to grant a decree of absolute divorce where adultery was proved. The decree in a case of impotency is given instanter while in cases of adultery a decree *nisi* is first given. This is in accordance with the law of England of July 15, 1870.

The Manitoba Judges will probably promulgate rules and regulations to govern the procedure for that Province. The Rules and Regulations of the English Courts of July 15, 1870, are no part of the law of England, and hence were not introduced into Manitoba by the 1888 Dominion Act.

Professor Oliver's work, "The Canadian North-West, its early Development and Legislative Records" was placed before their Lordships of the Judicial Committee, and would have been invaluable if the Judicial Committee had found it necessary to determine the authority and jurisdiction of the Governor and Council of Assiniboia and the General Quarterly Court of the Hudson's Bay Company's regime.

When the 1888 Act was introduced into the House of Commons by Sir John Thompson, the then Minister of Justice at Ottawa, David Mills, who was a member of the House of Commons, approved of the Bill, and pointed out the necessity for same. Mr. Mills had done much research work in assisting Oliver Mowat to prepare Ontario's case against the Dominion in the famous boundary dispute. Mr. Mills said, in part, in regard to the 1888 Act: "So that what particular law is in force in that country apart from our legislative declaration would be a matter of extreme doubt, whether it would be the old law of France or the common law of England, and whether it was the law of England in 1774 or 1791 is also a matter of doubt. Therefore it seems to me that the proposed legislation by the Minister of Justice is highly necessary to remove all doubt and determine what law does govern the people in that country within the jurisdiction of the Parliament of Canada."

From an historical standpoint one must regret that the Judicial Committee did not find it necessary to deal conclusively with the period prior to July 15, 1870.

In the Alberta case of *Board* v. *Board* (*post* p. 13) the argument covered much the same ground as in the *Walker* case. The main part of the argument was as to the capacity of the Courts, first of the North West Territories and later of the Province of Alberta, to adjudicate on divorce pleas after the substantive law was in force.

The Province of Saskatchewan took no part in these divorce cases, but the Courts of that Province will now have the same rights to adjudicate on divorce pleas as belong to the Courts of Manitoba and Alberta. The Judges in Alberta and Saskatchewan will also probably enact rules to settle the procedure for their respective Provinces.

As to whether or not the new order of things resulting from the decisions in the *Walker* and *Board* cases is as it should be one cannot do better than quote the words of Sir Richard Bethell (afterwards Lord Westbury) the then Attorney-General, in introducing the English Act of 1857:—

"He had abstained of course from dwelling on the evils existent in the present law, which has been so long admitted, so universally recognized, so frequently pointed out not only in Parliament but out of Parliament, not only by lawyers but by every writer upon the habits and manners of the people, that it would be a mere waste of time to enter upon so trite a subject."

What Sir Richard Bethell said in the English Parliament on that occasion is applicable to the system by which only Parliamentary divorces can be obtained in parts of Canada. Such a system in its operation means one law for the rich and another for the poor. The decisions in *Walker* and *Board* will place all classes in Manitoba, Saskatchewan and Alberta on an equality as far as getting a divorce is concerned.

Dominion of Canada.

SUPREME COURT.

Que.] RILEY v. APEDAILE. [Aug. 4.

Appeal—Leave—"Winding-up Act," R.S.C., 1906, c. 144, s. 106.

Leave to appeal to the Supreme Court of Canada from a judgment in proceedings under the Winding-up Act will not be granted, though the amount in controversy exceeds $2,000, if no important principle of law nor the construction of a public Act nor any question of public interest is involved.

Motion dismissed with costs.

Chauvin, K.C., for the motion; *Elder, contra.*

B.C.] BRITISH COLUMBIA ELECTRIC R. CO. v. DUNPHY. [Oct. 20.

Negligence—Contributory—Collision—Automobile and street car—Jury's findings—Sufficiency.

The action is for damages for injuries suffered in a collision between an automobile driven by the respondent and appellant's street car. At the trial, one witness for the respondent, who was in the automobile, testified to having warned the respondent before the accident; and the respondent was not called to explain his failure to act upon this warning. The jury, after having found the appellant guilty of negligence, specified such negligence in the following terms: "Insufficient precaution on account of approaching crossing and conditions existing on morning in question."

Held, that the jury's findings, if read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial Judge, were justified both as to appellant's negligence and as to absence of respondent's contributory negligence and were not too vague to support entering of judgment for respondent.

Judgment of the Court of Appeal affirmed.

Tilley, K.C., for appellant; *Mayers*, for respondent.

B.C.] THE KING v. JEU JANG HOW. [Oct. 16.

Appeal—Jurisdiction—Habeas corpus—"Criminal charge"—Person at large—R.S.C., c. 139, ss. 39(c) and 48 Supreme Court Act—8 & 9 Geo. V. c. 7, s. 3.

A Board of Enquiry, proceeding under the Immigration Act, ordered the deportation of the respondent, who thereupon applied for a writ of *habeas corpus*. The writ was refused by the trial Judge; but the Court of Appeal granted it and ordered the respondent's discharge.

Held, that an appeal from the Court of final resort in any Province except Quebec in a case of *habeas corpus* under sec. 39(c) of the Supreme Court Act will not lie unless the case comes within some of the provisions of sec. 48, as amended by 8 & 9 Geo. V. ch. 7, sec. 3. *Mitchell* v. *Tracey* (58 Can. S.C.R. 640), followed.

Per Duff and Anglin JJ.—The words "criminal charge" in sec. 39(c) of the Supreme Court Act mean a charge preferred before a tribunal authorized to hear such a charge either finally or by way of preliminary investigation; and the Board of Enquiry

under the Immigration Act is not a tribunal by which the respondent could have been convicted of criminal offence.

Per Duff and Anglin JJ.—The right of appeal given by sec. 39(c) in cases of *habeas corpus* does not exist where the Court below has ordered the release of the person, the legality of whose custody was in question in the Court below and that person is at large. *Cox* v. *Hakes* (15 App. Cas. 506), followed.

Mignault, J., *dubitante.*

Reporters' note. See also *Fraser* v. *Tupper* (Cout. Dig. 104.)

Appeal quashed with costs.

Sir Charles Tupper, K.C., for motion; *Sinclair,* K.C., *contra.*

Ont.] HONSBERGER v. WEYBURN TOWNSITE CO. [Oct. 14.

Constitutional law—Provincial company—Status ab extra—Comity—Right of action—License—Extra-provincial Corporations Act (R.S.O. [1914] c. 179).

Item 11 of sec. 92 B.N.A. Act, 1867, empowering the Legislature of any Province to make laws in relation to "the incorporation of companies with provincial objects" does not preclude a Legislature from creating a company with capacity to accept extra-provincial powers and rights. *Bonanza Creek Gold Mining Co.* v. *The King,* followed.

Such capacity need not be expressly conferred. It is sufficient if the intention of the Legislature to confer it can be gathered from the instruments creating the company.

A Saskatchewan company may, on obtaining a license under the Extra-provincial Corporations Act (R.S.O. [1914] ch. 179), enforce in the Ontario Courts the performance of a contract entered into with a resident of that Province and an action therefor may be maintained though the license was not granted until after it was instituted.

Judgment of the Appellate Division (45 Ont. L.R. 176), reversing that on the trial (43 Ont. L.R. 451), affirmed.

Hellmuth, K.C., and *Kingstone,* for appellant; *Tilley,* K.C., and *Payne,* for respondent.

Alta.] LOCAL UNION NO. 1562 v. WILLIAMS. [Oct. 14.

Trade Unions—Inducing dismissal of non-unionists by threatening strike—Right to damages—Liability of individual members—Practice and procedure—Unincorporated body—Representative action.

The respondents being miners and members of the Local Union appellant, were employed by the Rose-Deer Mining Com-

pany. The manager of the company becoming dissatisfied with the actions of the Union, closed the mine down; but he opened it again, and the respondents returned to work, agreeing to the condition not to pay any Union dues. The respondent Williams then received an anonymous letter calling him a "scab"; and when a new Local Union was organized, both respondents refused to join until the matter of the letter was "cleared up." Later on, the manager of the Mining Company advised the respondents that they would be discharged unless they settled with the Union as he had received notification that the Union would declare a strike if they continued to work. This notification was given by the appellants Young and Stefanucci. The respondents being subsequently discharged, took an action against the individual appellants on ground of conspiracy to injure them by inducing their dismissal and against the Local Union for unlawful intimidation by the threat of a general strike. The Local Union was not incorporated nor registered under the Trades Union Act; and an application was made at the close of the trial to amend the statement of claim by making the individual appellants defendants in their representative capacity, but this was not granted.

Held, that upon the evidence, the respondents' action should be dismissed, except as to the appellants Young and Stefanucci; Idington and Mignault, JJ., dissenting; Duff, J., would have dismissed the action *in toto*.

Per Duff, J. The conduct of the appellants cannot be construed as intimidation or coercion by "threat" and did not expose them to an action in damages in the absence of the characteristic elements of a criminal conspiracy to injure. *Quinn* v. *Leathem* (1901), A.C. 495, discussed.

Per Anglin and Brodeur, JJ. In the absence of legal evidence that they were present at the meetings where the acts complained of were authorized or that they otherwise have sanctioned them, the mere membership in the Local Union would not render the other appellants personally and individually answerable in damages for the results of these acts.

Per Anglin, Brodeur and Mignault, JJ. The dismissal of the respondents was the direct and intended outcome of the action of the Local Union's committee, such action amounting to a coercive threat and being therefore an unlawful means taken to interfere with the respondents' engagement; and the liability of the Local Union appellant, if being susceptible of being suable, has been established, but the delivery of the message of the committee by the appellants Young and Stefanucci to the manager of the mining company, having regard to all the circumstances, makes them presumably liable towards the respondents.

Per Anglin and Brodeur, JJ. The issue of want of entity was sufficiently raised by the explicit denial of the allegation that the Local Union was a body corporate.

Per Anglin and Brodeur, JJ. No action lies against an unincorporated and unregistered body in an action of tort such as the present one. Mignault, J., *dubitante.*

Per Anglin and Brodeur, JJ. The rule of practice by which, when numerous persons have a common interest in the subject matter of an action, one or more of such persons may be sued on behalf of all persons interested, which rule was invoked in support of the application for an order for representation, cannot properly be applied in an action of tort such as the present one and without evidence that the individual appellants could fairly be said to be proper representatives. Idington, J., *contra.*

Per Mignault, J., dissenting. The Local Union having throughout the litigation acted as if having been validly sued, it is too late now to urge the objection of want of entity; and, moreover, the judgment of the trial Judge should not be interfered with on a matter of procedure.

Appeal allowed, except as to the appellants Young and Stefanucci, Idington and Mignault, JJ., dissenting; Duff, J., would have dismissed the action *in toto.*

A. M. Sinclair, K.C., and *H. Ostlund*, for appellants.

E. V. Robertson, for respondents.

Province of Ontario

SUPREME COURT, APPELLATE DIVISION.

Full Court.] RUBBERSETT CO. v. BOECKH BROS. [49 D.L.R. 13.

Trade name—"Rubberset"—Descriptive word—Monopoly—Expiry of patent—Acquisition of secondary meaning.

The word "Rubberset" being clearly a descriptive word, invented to express the exact article produced by a patented process, a monopoly in its use cannot be asserted after the patents covering it have run out.

In view of the short time since the expiry of the patents the word could lose its primary and descriptive character and acquire a dominating secondary meaning as describing the product of the appellant's factory.

Robertson and *Pickup* for the plaintiffs, appellants; *Anglin*, K.C., and *McKeown* for defendants.

ANNOTATION FROM 49 D.L.R.

Name of Patented Article as Trade Mark.

By RUSSEL S. SMART, B.A., M.E., of the Ottawa Bar.

The right of the public to make free use of the name of a patented article after expiration of the patent has often been sustained.

In the leading case of the *Singer Mfg. Co.* v. *Hermann Loog* (1882), 8 App. Cas. 15, Lord Selborne, L.C., said at p. 27:—

"The reputation acquired by machines of a particular form or construction is one thing; the reputation of the plaintiffs, as manufacturers, is another. If the defendant has no right under colour of the former, to invade the latter, neither have the plaintiffs any right under colour of the latter, to claim (in effect) a monopoly of the former. If the defendant has (and it is not denied that he has) a right to make and sell, in competition with the plaintiffs, articles similar in form and construction to those made and sold by the plaintiffs, he must also have a right to say that he does so, and to employ for that purpose the terminology common in his trade, provided always that he does this in a fair, distinct and unequivocal way."

See also *Singer Mfg. Co.* v. *Wilson* (1876), 2 Ch. D. 434, 456, and *Wirter & Co., Ltd.* v. *Armstrong & Co.* (1898), 16 R.P.C. 167.

In another case of *Singer Mfg. Co.* v. *Stanage*, 2 McCrary, 512, Treat, J., said at p. 514: "When a patented article is known in the market by any specific designation, whether of the name of the patentee or otherwise, every person at the expiration of the patent has a right to manufacture and vend the same under the designation thereof by which it was known to the public . . . The original patentee or his assignees have no right to the exclusive use of said designation as a trade mark. Their rights were under the patent, and expired with it."

Other United States cases were *Singer Mfg. Co.* v. *Larsen* (1878), 8 Bissell 151, and *Singer Mfg. Co.* v. *Riley* (1882), 11 Fed. Rep. 706.

Even where no patent is obtained a person who produces a new article and is the sole maker of it may, unless care is taken, lose his exclusive right to the name. As pointed out by Fry, J., in *Siegert* v. *Findlater* (1878), 7 Ch. D. 801 at p. 813:—

"It is to be observed that the person who produces a new article, and is the sole maker of it, has the greatest difficulty (if it is not an impossibility) in claiming the name of that article as his own, because, until somebody else produces the same article, there is nothing to distinguish it from."

On this theory "Valvoline" as the name of an oil was held not a good trade mark in *Re Leonard & Ellis* (1884), 26 Ch. D. 288, and so also "Albion" has been held to indicate metal goods of a particular pattern, and not that of a particular manufacture in *Re Harrison, McGregor & Co.'s Trade Marks*, (1889), 42 Ch. D. 691.

The law has been thus summed up by Rigby, L.J., delivering the judgment of the Court of Appeal, in *In re Magnolia Metal Co.'s Trade Marks*, [1897] 2 Ch. 371, 391: "When the article is made under a secret process or its manufacture is protected by a patent, no person who has not acquired the secret or obtained a license from the patentee can manufacture it. Accordingly,

it is established as a general rule that, when an article is made under a secret process, or when the manufacture of it is protected by a patent, the manufacturer or patentee cannot, by any means, entitle himself to a monopoly in the use, after the secret process has been discovered or the term of the patent has expired, of the name by which the manufactured article is exclusively known whilst the secret is undiscovered, or the term of the patent is unexpired."

Another valuable statement may be found in the judgment of Parker, J., in *Burberrys* v. *Cording & Co. Ltd.* (1909), 26 R.P.C. 693, at p. 701: "The principles of law applicable to a case of this sort are well known. On the one hand, apart from the law as to trade marks, no one can claim monopoly rights in the use of a word or name. On the other hand, no one is entitled by the use of any word or name, or indeed in any other way, to represent his goods as being the goods of another to that other's injury. If an injunction be granted restraining the use of a word or name, it is no doubt granted to protect property, but the property, to protect which it is granted, is not property in the world or name, but property in the trade or goodwill which will be injured by its use. If the use of a word or name be restrained, it can only be on the ground that such use involves a misrepresentation, and that such misrepresentation has injured, or is calculated to injure another in his trade or business. If no case of deception by means of such misrepresentation can be proved, it is sufficient to prove the probability of such deception, and the Court will readily infer such probability if it be shewn that the word or name has been adopted with any intention to deceive. In the absence of such intention, the degree of readiness with which the Court will infer the probability of deception must depend on the circumstances of each particular case, including the nature of the word or name, the use of which is sought to be restrained. It is important for this purpose to consider whether the word or name is *primâ facie* in the nature of a fancy word or name, or whether it is *primâ facie* descriptive of the article in respect of which it is used. It is also important for the same purpose to consider its history, the nature of its use by the person who seeks the injunction, and the extent to which it is or has been used by others. If the word or name is *primâ facie* descriptive or be in general use, the difficulty of establishing the probability of deception is greatly increased. Again, if the person who seeks the injunction has not used the word or name simply for the purpose of distinguishing his own goods from the goods of others, but primarily for the purpose of denoting or describing the particular kind of article to which he has applied it, and only secondarily, if at all, for the purposes of distinguishing his own goods, it will be more difficult for him to establish the probability of deception.

In another leading case of *Cellular Clothing Co. Ltd.* v *Maxton and Murray*, [1899] A.C. 326, Lord Davey said, at 343:—

"The other observation which occurs to me is this; that where a man produces or invents, if you please, a new article and attaches a descriptive name to it—a name which, as the article has not been produced before, has, of course, not been used in connection with the article—and secures for himself either the legal monopoly or a monopoly in fact of the sale of that article for a certain time, the evidence of persons who come forward and say that the name in question suggests to their minds and is associated by them with the plaintiff's goods alone is of a very slender character, for the simple reason

that the plaintiff was the only maker of the goods during the time that his monopoly lasted, and therefore there was nothing to compare with it, and anybody who wanted the goods had no shop to go to, or no merchant or manufacturer to resort to, except the plaintiff. And on this point I adopt what was said in felicitous language by Fry, J., in *Siegert* v. *Findlater* (1878), 7 Ch. D. 801, at p. 813: "That is, my Lords, a matter of express decision in the case of a patent. If a man invents a new article and protects it by a patent, then during the term of the patent he has, of course a legal monopoly; but when the patent expires all the world may make the article, and if they may make the article they may say that they are making the article, and for that purpose use the name which the patentee has attached to it during the time when he had the legal monopoly of the manufacture. But the same thing in principle must apply where a man has not taken out a patent, as in the present case, but has a virtual monopoly because other manufacturers, although they are entitled to do so, have not in fact commenced to make the article. He brings the article before the world, he gives it a name descriptive of the article; all the world may make the article, and all the world may tell the public what article it is they make, and for that purpose they may *primâ facie* use the name by which the article is known in the market."

The Supreme Court of the United States states the rule as follows:—

"(U.S. Sup. Ct., 1896). It is the universal American, English and French doctrine that where, during the life of a monopoly created by a patent, a name, whether it be arbitrary, or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created; but such name must be so used as not to deprive others of their rights as to deceive the public, as by clearly indicating that the thing manufactured is the work of the one making it. *Singer Mfg. Co.* v. *June Mfg. Co.* (1896), 163 U.S. 169; 16 Sup. Ct. 1002; 41 L. Ed. 118, 75 O.G. 1703; 1896 C.D. 687. *Singer Mfg. Co.* v. *Bent* (1896), 163 U.S. 205; 16 Sup. Ct. 1016; 41 L. Ed. 131; 75 O.G. 1713; 1896 C.D. 711."

The following United States cases indicate the viewpoint of the Courts on this subject:—

"Lanoline" for a preparation of wool fat.

"(N.Y. Sup. Ct. 1902). Plaintiffs manufactured under letters patent a preparation of wool fat which they called 'Lanoline' which became the generic name of the article after the expiration of the patent. Defendant, a British corporation, manufactured a similar article which it called 'British Lanoline.' *Held*, that the patent having expired it had the right to call the article manufactured by it 'Lanoline' and that it violated no rights of plaintiffs by selling its product at 20 cents a can while plaintiff's was sold at 60 cents a can. *Jaffe et al.* v. *Evans & Sons, Ltd.* (1902), 75 N.Y. Supp. 257; 70 App. Div. 186."

"President" for patented suspender—name not generic.

"(U.S.C.C.A. 2nd Cir., 1916). On expiration of a patent for suspenders sold under the name and trade mark 'President,' such name and trade mark does not pass to the general public, the name never having constituted a generic description; consequently rights in the trade mark were not affected by the expiration of the patent. (For other cases, see Trade Marks and

Trade Names, Cent. Dig., p. 23, par. 15; Dec. Dig. 11). *President Suspender Co.* v. *Macwilliam* (1916), 238 Fed. Rep. 159." See headnote.

"Excelsior" for step-ladders—name of patented article.

"(App. D.C., 1908). Between 1870 and 1884 several patents for improvements in step-ladders were issued to C. G. Udell, the predecessor in business of The Udell Works. Udell adopted as his trade mark the word 'Excelsior.' The Excelsior ladder embodied features of several, but not of all, of the patents. Six other styles of ladders were manufactured, some of which closely resembled the Excelsior ladder and all of which embodied features of the Udell patents. Held, that the word 'Excelsior' did not become during the life of the Udell patents the generic designation of ladders manufactured thereunder. *Udell-Predock Mfg. Co.* v. *The Udell Works* (1908), 140 O.G. 1002." See headnote.

Same—that a trade mark is generic not to be presumed.

"(App. D.C., 1908). While care should be taken lest a monopoly be continued beyond the life of a patent through the agency of a trade name which has come to indicate to the public the patented article, the Patent Office would not be justified in presuming that a trade mark was generic. In the present case the appellee company has built up a trade in ladders because of the superior excellence of the product and the fair dealings of the company. Manifestly it would be unjust to deny the company the benefit of its reputation unless convinced that to do so would prolong a monopoly."

"Bethabara Wood" generic and descriptive term.

"(U.S. D.C. Pa., 1919). Where the name 'Bethabara Wood,' invented by plaintiff, by general use became the descriptive name for a certain wood many years before he secured a registered trade mark for it and before it had become associated with plaintiff's product, he acquired no exclusive right to the name, preventing defendant from handling and selling wood under that name. *Shipley* v. *Hall* (1919), 256 Fed. Rep. 539." See headnote.

"Tabasco"—Name of patented article—Patent abandoned before expiration.

"(U.S. C.C.A. 5th Cir., 1918). At the expiration of a patent the public has the right to use the name which was employed to identify the patented article during the life of the patent, but where a patent was granted for pepper sauce and the process of preparing it, and the patentee manufactured and sold a sauce under the name 'Tabasco' which, prior to the expiration of the patent, is made in a way to bring it without the protection of the patent, the use of the name continuing, the general rule does not apply, since the right to the name as a trade mark had been acquired with respect to a product which was not the subject of the patent. *McIlhenny Co.* v. *Gaidry*; *Gaidry* v. *McIlhenny Co.* (1918), 253 Fed. Rep. 613."

It has been held by the United States Supreme Court that the principle involved in the *Singer* cases applies, notwithstanding the fact that the patent is a foreign one. *In Re Holzapfel's Compositions Co.* v. *The Rahtjen's American Composition Co.* (1901), 183 U.S. 1; 22 Sup. Ct. 6; 46 L. Ed. 49; 97 O.G. 958; 1901 C.D. 500, the trade mark claimed was used to describe a composition patented in England and it was held that when the patent expired the right to make the composition and the right to describe it by that name is open to the public. The principle involved in the *Singer Mfg. Co.* v. *June Mfg. Co.* (1896), 163 U.S. 169, applied notwithstanding the fact that the patent was a foreign one.

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